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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
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COMMITTEE OF GOVERNMENTAL EXPERTS
ON THE INTERNATIONAL PROTECTION OF CULTURAL PROPERTY

Report on the second session
(Rome, 20 to 29 January 1992)

(prepared by the Unidroit Secretariat)

Rome, June 1992

1. In opening the second session of the Unidroit committee of governmental experts on the international protection of cultural property at 11 a.m. on 20 January 1992, the President of Unidroit, Mr Riccardo Monaco, welcomed the participants (see the list in APPENDIX I), and expressed his appreciation to Mr Francesco Sisinni, Director-General of the Italian Ministry of Culture, for having once again agreed to the holding of the session at the Complesso Monumentale San Michele a Ripa in Rome. He then called upon the Chairman of the committee of experts, Mr Pierre Lalive, to take his place beside him for the purpose of presiding over the discussions as he had so ably done on the occasion of the first session.

2. Mr Sisinni also welcomed the participants in the session and laid stress on the particular importance which his Ministry attached to Unidroit's work in connection with the protection of the cultural heritage, especially on account of the very serious situation existing as a consequence of thefts and of the clandestine market. He had indeed to report an ever greater increase in the number of thefts of works of art (from 2800 to 6800 between 1989 and 1990, and double that figure in 1991); those objects were subsequently taken abroad illegally and in violation of existing legislation.

3. He stated that Italy's efforts to protect cultural objects had, at the internal level, above all been directed towards their cataloguing, as the public's awareness of the heritage and the fact that it considered that heritage to be its own constituted the most effective form of protection. At Community level, and concerned by the abolition of frontiers as from 1 January 1993, the Ministry had sought to develop ties of friendship and to encourage periodical meetings between museum directors with a view to instituting a greater degree of cooperation, in particular at the time of the acquisition of cultural objects. Italy had moreover continued to participate actively in international meetings with the aim of laying down principles which would guarantee a genuine international protection: the first point was the mutual recognition of national laws and the second the granting of a kind of identity card for cultural objects, which would likewise resolve the problem of acquisition in good faith.

4. In conclusion, Mr Sisinni emphasised the fact that Unidroit's work was running in parallel with the efforts of his country and of his Ministry, the former addressing above all legal aspects with a view to the harmonisation or conciliation of national laws and the latter setting out more specifically from cultural convictions.

5. Mr Lalive thanked the Director-General of the Ministry for having honoured the meeting by his presence, for his hospitality and for his statement which had clearly indicated the different aspects of the problem and means of solving it. He believed that those different means had to be combined if an end were to be put to the scandal of the illicit traffic in cultural objects.

Item 1 - Adoption of the draft agenda (G.E./C.P. - Ag. 2)

6. The committee adopted the draft agenda prepared by the Secretariat (see APPENDIX II).

Item 2 - Consideration of the preliminary draft Unidroit Convention on stolen or illegally exported cultural objects
(Study LXX - Docs. 22-27)

7. The committee was seized of the following documents:

Study LXX - Doc. 22: Working papers submitted during the first session of the committee (Rome, 6 to 10 May 1991)

Study LXX - Doc. 23: Report on the first session (Rome, 6 to 10 May 1991) prepared by the Unidroit Secretariat

Study LXX - Doc. 24: Observations of Governments on the preliminary draft Unidroit Convention on stolen or illegally exported cultural objects (Canada, China, France, Islamic Republic of Iran, Norway, Sweden and Turkey)

Study LXX - Doc. 25: Observations of international organisations on the preliminary draft Unidroit Convention on stolen or illegally exported cultural objects (Unesco and Interpol)

Study LXX - Doc. 26: Observations of Governments on the preliminary draft Unidroit Convention on stolen or illegally exported cultural objects (Israel)

Study LXX - Doc. 27: Observations of Governments on the preliminary draft Unidroit Convention on stolen or illegally exported cultural objects (Germany)

8. It was agreed not to proceed to a general discussion, without however preventing delegations from raising any specific points, but rather to examine the text of the preliminary draft Convention on stolen or illegally exported cultural objects⁽¹⁾ on an article by article basis, in the light *inter alia* of the written observations of Governments and of international organisations set out respectively in Study LXX - Docs. 24, 25, 26 and 27. The Chairman expressed the wish that the committee confine itself to questions of substance, leaving to the drafting committee proposals of a purely drafting nature.

(1) For the sake of convenience the text of the preliminary draft Convention submitted to the committee is reproduced in APPENDIX III hereto.

9. The drafting committee met for one day and sought to summarise the various written and oral proposals submitted during the working sessions of the committee of experts. The results of its work appeared in document G.E./C.P. 2nd session, Misc. 37 (now Study LXX - Doc. 29, Misc. 37 rev.), and it was this text which the committee considered on second reading, proceeding to a series of indicative votes on questions of principle rather than of drafting.

CHAPTER I - SCOPE OF APPLICATION AND DEFINITION

Article 1

10. The discussion on Article 1 raised the question of whether it ought not be spelt out that the Convention should, in relation to the resolution of stolen cultural objects, apply only to international situations and not to internal situations.

11. The representative of France in particular reiterated the doubts already expressed by her delegation at the first session at the fact that the initial intention had, in conformity with the mission of Unidroit, been to create a uniform law in substitution for the internal law of the member States. These hesitations were based on two grounds of concern: the first related to domestic law, in the sense that her country would be reluctant to contemplate the radical change as regards the notion of possession which the uniform law would introduce. The second was that what was being drawn up was a practical instrument with very specific aims the purpose of which, by the establishment of judicial and administrative cooperation, was to secure the return of stolen or illegally exported cultural objects and the question therefore arose as to whether it was necessary to envisage a uniform law which would apply in place of domestic law. Indeed, she believed that to the extent that it would be possible to agree on certain common basic notions (theft, limitation periods, definition of a cultural object,...), it was not indispensable, for the administrative and judicial cooperation contemplated to achieve the desired result, to run the risk of substantially altering domestic law. She therefore proposed once again that it be made clear in one way or another that theft as envisaged by the article and in other relevant articles of the Convention should be of an international character (cf. Study LXX - Doc. 24, p. 8).

12. The representative of Unesco was opposed to such a proposal, considering it preferable for the Convention to apply to all transactions and not only to those of an international character. In her opinion "it would be a difficult and complicating task to determine whether or not there was an international element", that "a considerable incentive for some States to accept the Convention would be that it would to some extent unify the law as regards transactions in cultural objects" and that "traffickers have proved adept at exploiting differences in national

legislation to evade controls and to take advantage of those differences" (cf. Study LXX - Doc. 25 and Doc. 29, Misc. 6).

13. The proposal was supported by a number of delegations which however pointed out that it related in particular to the provisions of Chapter II, as it was evident that Chapter III by its very nature could only apply to international situations. There was general agreement that it would be difficult, if not impossible, to define precisely what was an international situation, a difficulty which was encountered whenever an international Convention was being drawn up. A number of proposals were however made with a view to introducing the concept in the text.

14. One representative proposed the following wording: "This Convention applies in international situations to claims for the restitution ...", thereby leaving it to practice to define what was international. Thus, if a State wished to amend its domestic law so as to adapt it to the Convention, it would be free to do so, but this would remain outside the scope of the Convention. Another representative was of the opinion that a situation would become international once the object had crossed a frontier, and he proposed the following formula: "This Convention applies to claims for the restitution of stolen cultural objects which have been removed across an international frontier".

15. Given that it would be almost impossible in practice to define an international situation, another representative suggested that it be specified that the Convention would only apply to international situations, but this would not be done in the body of the Convention but rather in its title or in the preamble. He further suggested that an attempt should be made to create within the framework of the Convention an autonomous concept of an "international theft of cultural objects", but if, even after the creation of such a concept, some States were still reluctant to accept the Convention, one could envisage, perhaps in the final clauses, the possibility of giving States an option to be bound only by one part of the Convention (theft or illegal export), or to exclude the provisions applicable to theft or to limit their application.

16. The delegation of the United States recalled that it had at the first session submitted a sketch of a definition of an international claim, for it was not the theft which was international but the circumstances which introduced such an element. It therefore drew attention to the need to be specific and to the fact that it had, in respect of stolen objects, had regard to the habitual place of residence, to the place of the theft and to the place where the stolen object was located for the purpose of defining three international situations (cf. Study LXX - Doc. 22, Misc. 8 and Doc. 23, paragraph 152). So as to avoid however encumbering the article with too much detail, and since the basic concern was the same, that is to say to limit the scope of the Convention to international situations only, it was proposed simply to state in Article 1 that "This Convention applies to international claims as described in Article 9...".

17. A consensus emerged within the committee that the Convention should apply only to international situations, but the different drafting proposals were referred to the drafting committee which would meet later during the course of the session.

18. The committee then considered a written Chinese proposal (cf. Study LXX - Doc. 24, p. 5) calling for the deletion of the word "export" at the end of the article, which took up a Mexican proposal that had been submitted at the first session of the committee (cf. Study LXX - Doc. 23, paragraphs 30 to 32). Some representatives supported this proposal on the ground that certain countries had no export legislation specifically concerning cultural objects but rather provisions in other types of legislation governing the export of such objects and that there was a risk that those cases might not be covered by the Convention. Moreover, one representative pointed out that an infringement of export legislation might be of a very minor character, for example failure to comply with a technical export rule, although in fact the transfer was itself legal and the intention in such cases was that the Convention ought not to apply as the State of origin would have no interest in its so doing.

19. A consensus having emerged that the problem was essentially one of drafting, and that the words "export legislation" were directed to those provisions which prohibited the transfer abroad of cultural objects with a view to their protection or to conserving the national heritage, a number of drafting proposals were put forward. The first of these spoke only of "relevant legislation", a second replaced the word "legislation" by "provisions" or "rules", while another spoke of "the law applicable to the protection of cultural objects" (cf. Study LXX - Doc. 29, Misc. 7) and yet another consisted in the addition of the words "as a national cultural treasure" (cf. Study LXX - Doc. 29, Misc. 36). One representative further believed that a distinction should be drawn between export, which was an objective fact, and the infringement of export legislation, which was not certain as other legislations might have been infringed and she suggested a formula to the effect that the export must have taken place but that the question of whether what had been infringed was export legislation or another type should be determined by the judge or by the law of that State (cf. Study LXX - Doc. 29, Misc. 1).

20. Finally, the representative of the United States recalled that his delegation had submitted a proposal at the first session of the committee (Study LXX - Doc. 22, Misc. 6) which, while concerning Article 5 (1), nevertheless touched on this point. The proposal was in effect to maintain the word "export" in Article 1, but to amend Article 5(1) so as to assist the judge of the forum.

21. The committee then turned to a proposal to replace, in the English version only, the words "cultural objects" by "cultural property". Since such a proposal had already been considered by the committee, it was referred to the drafting committee and, on second reading, only two

delegations voted in favour of it. The words "cultural objects" were therefore retained.

22. In the course of its discussion of Article 5, and in particular paragraph (3)(e) of that article, the committee considered the problem of clandestine excavations and the question of whether they merited a specific provision. The discussion on this matter will be taken up later but there was in any event a certain consensus that the problem should already be mentioned in Article 1, and a number of drafting proposals were made (cf. Study LXX - Doc. 29, Misc. 9, Misc. 21 and Misc. 27).

23. On second reading, the committee of experts was seized of a new text drawn up by the drafting committee which consisted of two alternatives so as to permit consideration to be given to all the proposals which had been made (cf. Study LXX - Doc. 29, Misc. 37 rev.). The first question the committee was called to vote upon was that of whether the Convention should clearly indicate that it dealt only with international situations and that principle was adopted by 26 votes to none. The committee also decided by 25 votes to none that this should be stated not only in the title, but also in Article 1.

24. The next vote concerned the introduction of a possible connecting factor which some representatives had proposed. 16 delegations favoured a connecting factor of the type contained in Alternative II, sub-paragraph (a) while seven preferred a more general reference.

25. On the question of whether clandestine excavations should be mentioned in Article 1, whether they be illegal excavations or legal excavations from which objects were subsequently illegally removed, 19 delegations favoured such an inclusion while seven voted against it.

26. The last point which the committee was called upon to decide concerned the words "export legislation" and the proposals made for their deletion or amendment. Only three delegations voted in favour of the retention of the words and the committee therefore proceeded to vote on other proposed language: the first consisted in a reference to "the law applicable to the protection of cultural objects". 14 votes were cast in favour of the proposal, six against and there were five abstentions. As to the possibility of simply saying "contrary to its law" nine delegations voted for it, 13 against and there were four abstentions. Since no clear majority emerged from the vote, those different formulations have been retained in square brackets in the new text.

Article 2

27. The definition of "cultural objects" for the purpose of the Convention was the subject of lengthy discussion by the committee and reflected not only differences of opinion in the technical drafting

approach but also as to the substance of the definition and its implications.

28. One representative whose legal system employed the technique of lengthy and detailed definitions with a view to avoiding problems of application for the judge, (but which generally speaking were associated with a restrictive interpretation), proposed the addition of an introductory paragraph using a general formula, followed by a list to be modelled on Article 1 of the 1970 Unesco Convention. He considered that the formula preferred by the study group, whose choice had been dictated principally by the differences among legislations and international instruments in this respect, was too vague and difficult to apply.

29. A number of representatives, although satisfied with the general formula adopted, nevertheless suggested the introduction of other adjectives in the article notwithstanding its non-exhaustive character. It was thus proposed adding the following: "archaeological", "scientific", "archival", "bibliographical", "literary", "ethnological", "anthropological", "religious", "objects of significance for the natural heritage" and "prehistoric". One representative also suggested the substitution of the words "cultural importance" by "cultural interest", but in the opinion of others this would impose a less strict condition.

30. Some representatives had at the preceding session expressed the view that the principal question was not that of finding a definition for the purposes of the Convention, but rather of deciding who it was who should determine the cultural character of an object. In this perspective the Canadian delegation proposed a new form of wording for Article 2 (cf. Study LXX - Doc. 24, p. 1) which left it up to each State to decide what was in its opinion culturally significant. A similar proposal jointly tabled by a number of delegations sought the addition of the words "cultural objects are those objects designated by each Contracting State" (cf. Study LXX - Doc. 29, Misc. 21). Finally, the Egyptian delegation proposed adding the words "in accordance with the law of the requesting State" (cf. Study LXX - Doc. 29, Misc. 27).

31. In support of these proposals it was recalled that Article 1 of the 1970 Unesco Convention made provision for such a mechanism and that a certain number of States such as Australia and Canada had in their national law implementing that Convention expressly stated that they would return any illegally exported cultural object as so defined by the law of the requesting State. Other States had similar laws or laws which led to the same result.

32. For their part some representatives believed that such a solution would be unacceptable as it would risk depriving the State addressed of any element of appreciation and would imperil the Convention since no State would be willing to ratify a Convention under which it would be obliged to return an object without having any control over the determination of its

cultural nature. It was also pointed out that a reference to States was inappropriate here as under Chapter II a party seeking to obtain restitution of an object might be a private person and not a State.

33. With a view to meeting these objections and avoiding a State addressed being able to decide arbitrarily what was or was not a cultural object, one representative proposed a compromise solution the second paragraph of which provided that the State addressed must take into account the law relating to the protection of the cultural objects of the requesting State (cf. Study LXX - Doc. 29, Misc. 24 Add.). Another representative suggested that this formulation might be strengthened by the addition of the words "in accordance with the opinion of experts on that culture".

34. The Swedish delegation (cf. Study LXX - Doc. 24, p. 19) raised the question of whether one should not simply limit the scope of the definition, and hence the application of the Convention, to cultural objects deserving special protection on account of their "outstanding" significance, and together with the delegations of a number of other States submitted a written proposal to that effect (cf. Study LXX - Doc. 29, Misc. 24). Those representatives believed that although the definition was subject to certain limitations in Chapter III concerning the return of illegally exported cultural objects, it was much too broad in respect of theft, (even though the study group had decided in Chapter II not to limit the substantive scope of application because most national legislations provided for the restitution of stolen objects).

35. The importance of this question was stressed since the future Convention would have considerable implications for the private law rules of States as regards the acquisition of movable property, and serious doubts might be entertained as to whether Governments would be prepared to contemplate changes to those rules for such an ill-defined category of objects. What were at issue were political questions which demonstrated the link between the general definition laid down in Article 2 and the legal regime governing stolen or illegally exported objects established by Chapters II and III. Given the differences between the two regimes, some representatives wondered whether it might not be more appropriate to have one definition for Chapter II and another for Chapter III, rather than a single definition common to both of them.

36. On second reading, Article 2 was submitted to the committee in the form of four variants together with a proposal for a second paragraph (cf. Study LXX - Doc. 29, Misc. 37 rev.). Some representatives were opposed to an indicative vote on those variants and in particular to the introduction of a reference to the law of the requesting State, since the implications of the proposed variants had not been considered, especially in connection with Chapter II. It was moreover recalled that the present text sought only to define the subject-matter of the Convention without laying down the legal regime governing cultural objects. It was therefore possible to

conceive of different regimes for stolen and for illegally exported objects, without thereby affecting the general definition.

37. The committee was however called upon to vote on the question of whether it preferred a definition which would allow each Contracting State to determine its cultural objects for the purposes of the Convention, or on the other hand a definition of cultural objects that would be of general application. 19 delegations expressed support for a general definition which would in no way prejudice the regime subsequently to be established for Chapters II and III, while 15 delegations preferred a reference to the national legislation of the Contracting States, and two delegations abstained.

38. The committee preferred not to vote on the questions of whether any further adjectives should be added, on the introduction of a reference to the State of origin, on the compromise proposal in Study LXX - Doc. 29, Misc. 24 Add., and on the addition of the word "outstanding" to qualify significance, since a decision still had to be taken as to whether the definition should apply only to Chapter II, to Chapter III or to both.

CHAPTER II - RESTITUTION OF STOLEN CULTURAL OBJECTS

Article 3

39. One member of the study group recalled that when preparing the draft its concern had been that a stolen cultural object should be returned. The group had been conscious of the fact that from the angle of comparative law this principle might constitute a kind of revolution for those countries whose law traditionally protected the good faith purchaser for value, but it had to be noted that Article 4 also constituted a revolution for those States which did not make provision for the payment of compensation and in consequence Chapter II was both balanced and fair.

40. In its written observations one delegation questioned the very principle of automatic restitution, believing that there was no reason to treat in a different way theft and illegal export as regards the options open to the possessor in the event of restitution or return.

41. Some representatives had however, in the discussion on the scope of application of the future Convention and on the definition of cultural objects, indicated that they would only be able to accept a radical change in their law for a very clearly defined category of objects or if the Convention were to apply to international situations only. One representative on the other hand believed that there were reasons why the Convention should also apply to national transactions as one of the essential ways in which it could have a practical impact on illicit traffic

was by forcing dealers and private collectors to be more vigilant when acquiring a cultural object by checking its provenance.

42. While recalling that the proposal was that the Convention should govern international situations, that is to say an entire process, and not theft of an international character, one representative suggested a possible solution which would lie in limiting the scope of the Convention to international situations while leaving the possibility for those States which so wished to extend the regime of Chapter II to domestic situations through the mechanism provided by Article 11, without obliging those which found this impossible to do the same.

43. Some representatives proposed that the person to whom the stolen object must be returned be specified as the present text failed to do so. A proposal was made to add to paragraph 1 the words "to the State of origin", but to this it was objected that it would change the structure of the system since in this context actions could be brought between private persons. Another proposal was made to complete the provision by a reference to "its owner", at the same time specifying that the owner should be determined by the court or competent authority referred to in Article 9 (cf. Study LXX - Doc. 29, Misc. 49).

44. Another representative proposed adding at the end of the paragraph the words "subject to the terms of this Convention" since it was clear from the subsequent provisions that there would be no restitution in certain cases (for example because the action was time-barred). Such an addition would be necessary in the interests of clarity (cf. Study LXX - Doc. 29, Misc. 38).

45. Certain representatives restated the proposal which had already been made at the first session of the committee to replace the word "possessor" by another term, for example "holder", or to define it more precisely. Although the word "détenteur", did not *a priori* pose any problems for the French version, it was pointed out that in English the word "holder" had a precise technical meaning and that it would therefore be preferable to speak of the "physical possessor" as did the draft EEC Directive. This latter proposal did not receive universal approval.

46. Some representatives were however anxious to lay down precise definitions so as to facilitate the application of the text by national judges. This was seen as being a problem of drafting technique, and one representative warned the committee against the use in a text of detailed provisions, which could pose problems of interpretation, and at the same time of general provisions for that could inhibit ratification of the instrument by many States. It was moreover suggested that the problem might be overcome by recourse to the Explanatory Report which would accompany the

text, thereby avoiding the mixing of different drafting techniques. It was furthermore emphasised that a national judge would have to interpret the general terms of an international Convention having regard to its object and purpose, and not only in accordance with his own national law.

47. The same could be said of the concepts of theft and of "stolen" cultural objects, the view having been expressed that those notions ought to be clearly defined. With regard to the concept of theft, some representatives were of the opinion that objects originating in clandestine excavations should be deemed to have been stolen, as was the case under a number of national laws. Others also wished to include objects which, although discovered in legal excavations, had subsequently been illegally disposed of (cf. Study LXX - Doc. 29, Misc. 31). This latter case moreover could more easily be assimilated to theft. The idea was also canvassed of an "autonomous" qualification of the notion of theft for the purposes of the Convention itself, which could be broader than traditional notions of theft, but some representatives believed that since what was in question were illegal acts committed abroad, the principles of private international law and the application of the law of the State where the act had been committed should be sufficient to solve the difficulties which had been raised.

48. As regards paragraph 2 of Article 3, concerning the limitation period for the bringing of actions to recover stolen cultural objects, there was a wide diversity of opinions. A number of representatives felt that for Civil Law systems in particular the Convention would represent a radical departure from existing law in relation to the good faith possessor and the protection which he was entitled to expect, by exposing him to the possibility of an action for recovery being brought a long time after the acquisition, and they were not prepared to see the limitation period further extended.

49. In response to the fears of some representatives that the limitation periods could have the effect of legitimising a situation which had initially been illegal, one representative recalled that the purpose of the limitation periods was on the one hand to encourage the possessor to take rapid action, as it was not the function of law to protect those who had been negligent, and on the other hand to avoid social disturbance which could result from the bringing of a very old claim. Moreover, he warned the committee against the absence of any limitation period for it should not be forgotten that every importing country was capable of becoming an exporting country and vice versa and that the rules could work in both directions.

50. A majority of representatives were of the opinion that the shorter limitation period of three years was too brief and that it could be interpreted as a kind of indirect incitement to theft. A five year period seemed to satisfy a greater number of delegations (cf. Study LXX - Doc. 29, Miscs. 27 and 31), and would moreover create a degree of parallelism with Article 7(b) concerning illegal export.

51. As to the absolute period of limitation, a large majority of representatives considered the 30 year period provided to be insufficient. Some suggested an extension to 50 years or even the absence of any time bar, believing that there should be no limitation in time on the possibility of seeking recovery of a stolen cultural object (cf. Study LXX - Doc. 29, Miscs. 27 and 49). One representative however proposed a reduction of the absolute period, which should be no more than six years, the period which was established by her own domestic legislation in respect of ownership, and suggested that States could if they so wished apply Article 11 for the purpose of extending the period.

52. While the length of the limitation period gave rise to different opinions, there was general agreement as to the time from which it should run, although one delegation proposed that the beginning of the shorter period should not be the discovery of the place where the object was located or the identity of the possessor, but an accumulation of the two. The period would therefore begin to run from a later date (cf. Study LXX - Doc. 29, Misc. 31). Some representatives however feared that such a proposal would make restitution too difficult. As to the absolute period, the point of departure was the time of the theft which would have to be proved in an action before the court and it was for this reason that one representative proposed adding a third paragraph to Article 3, the effect of which would be that the time of the theft would be established by the production of official documents (cf. Study LXX - Doc. 26).

53. The expression "or ought reasonably to have known" was once again the object of severe criticism, some representatives calling for its deletion as it was open to interpretation, ambiguous and contrary to the interests of the developing countries which were most frequently the origin of stolen cultural objects. Allusion was also made to the difficulty of bringing the necessary evidence. One member of the study group recalled however that this language was familiar to most legal systems and that it had been introduced precisely to cover those cases where it would be difficult to prove that the claimant knew where the object was located or the identity of the possessor.

54. Finally, the United States delegation which had, at the previous session, proposed balancing the obligation of the dispossessed person to act within certain periods of time by one on the possessor to give publicity to his possession or indeed to prevent the possessor from relying on the absolute period if he could not prove that he had exercised the necessary diligence in ascertaining the provenance of the object, submitted to the committee for discussion two alternatives for Articles 3 and 4 (cf. Study LXX - Doc. 29, Miscs. 16 and 16 Add.); the first of these deleted the words "or ought reasonably to have known" and the absolute period of limitation, while the second was much closer to the existing text.

55. On second reading the committee considered a text which sought to combine the various proposals which had been made (cf. Study LXX - Doc. 29, Misc. 37 rev.), and then voted on a number of issues. The first of these related to the possible mention in Article 3 of illegal excavations. 23 delegations supported such a reference while eight voted against and seven abstained.

56. The committee did not however proceed to a vote on the words "physical possessor" in paragraph 1, considering that more detailed discussion was necessary. The committee then voted on the addition of the words "to its owner", 13 delegations favouring such an addition, 17 voting against and six abstaining.

57. The committee turned to paragraph 2, the first question to be raised being that of whether or not it favoured the deletion of any notion of limitation. While no delegation supported the deletion of the shorter period, five favoured the removal of the absolute period, 18 voted against any idea of deletion and six abstained. The committee decided to retain in square brackets different figures for the two periods, considering that its own role was to establish the principle but that it should be left to the diplomatic Conference to determine the precise periods.

58. Still in connection with the periods of limitation, the committee was called upon to take a decision on the starting point of the shorter period, and more particularly to decide whether the conditions should be alternative or cumulative. 21 delegations voted in favour of the existing text, that is to say that the conditions would be alternative, while 12 preferred a solution whereby the limitation period would run only from the claimant's knowledge of both the place where the object was located and the identity of the possessor. Two delegations abstained.

59. With regard to the retention of the words "or ought reasonably to have known" 17 delegations voted to retain them, 11 to delete them and seven abstained.

Article 4

60. The principle of payment of compensation to a possessor required to return a stolen object established by paragraph 1 of Article 4, always subject it is true to the condition that he must have exercised the necessary diligence, was questioned by one representative who was of the belief that the payment of compensation to the holder of a stolen object ran contrary to all admitted principles. For this reason he proposed reversing the rule and replacing it by one to the effect that the good faith possessor would not be entitled to compensation save for one exception, namely when he had incurred expenses in the physical protection of the object, for which he would be reimbursed (cf. Study LXX - Doc. 29, Misc. 22).

61. Another delegation shared the same concern and, without expressing a preference for one of the other, submitted to the committee for consideration two alternative versions of Articles 3 and 4 (cf. Study LXX - Doc. 29, Miscs. 16 and 16 Add.), which reflected the opinions of persons whose views had been sought in its country. The first alternative followed the Common Law system according to which a thief can never become the rightful owner of stolen goods, the good faith purchaser would have to return the object and the possessor would have no right to compensation. That delegation believed that this was a salutary provision for potential buyers who might think that there was little risk in their acquiring an object since, if they were mistaken, they could recover the price paid, at least in part. The second alternative on the other hand contemplated the payment of compensation since it would be desirable to have the same regime for stolen objects and for illegally exported objects as otherwise there would be a strong incentive for all claims to be characterised in terms of theft so that the claimant would not have to pay any compensation. Furthermore, the prospect of compensation would incite buyers to take precautions, which would improve the overall situation at international level.

62. Always in connection with compensation, and more specifically with the person required to pay it, one representative believed that this should not be the dispossessed owner but rather the seller who was in bad faith or an insurance company. She believed that what was contemplated by the present text was something more in the nature of a ransom than compensation and that it guaranteed the economic profit of the seller who might be a thief. A proposal along those lines was submitted (cf. Study LXX - Doc. 29, Misc. 31). Another representative, while considering such a solution to be desirable, recalled her written observations in which it had been pointed out that in many cases the person in bad faith could not be found at the time when it was established that the cultural object had been stolen. However, in most systems recovery would in any event be available by way of remedies for fraud (cf. Study LXX - Doc. 25). Another representative indicated that the draft directive of the EEC Commission had adopted as a solution to this problem the technique of subrogation, while yet another drew attention to paragraph 2 of the article which, if interpreted in a reasonable manner, would not easily permit the award of compensation, thus limiting the extent of the problem which had been raised.

63. Finally, the Italian delegation reiterated the proposal it had made at the committee's first session designed to ease the financial difficulties which might face a State or a private person under an obligation to pay compensation in respect of which fears had been expressed by some representatives regarding the use of the adjectives "fair and reasonable" to describe the compensation. In the perspective of cultural promotion, the Italian proposal called for the institution of a mechanism of sponsorship of the compensation due to good faith possessors in place of

payment by claimants in circumstances where those claimants were unable to discharge the obligation, the compensation being paid by a third party who would undertake to ensure public use of the object in the requesting State and the cost of insurance and measures of conservation. That delegation suggested that this idea could be contained in a separate paragraph (cf. Study LXX - Doc. 29, Misc. 54).

64. One representative proposed replacing the words "necessary diligence" by the concept of "reasonable diligence" or "due diligence", considering that since the possessor was in possession of a stolen object, he clearly had not exercised the diligence necessary to avoid the acquisition. She also suggested that such language would carry the implication that a court would have to determine whether the possessor had, in all the circumstances, acted as he should have done (cf. Study LXX - Doc. 29, Misc 33. rev.).

65. With regard to the diligence required of the possessor, one representative considered that the reversal of the burden of proof in connection with the exercise of such diligence, which was under Article 4 placed upon the possessor, was contrary to many legal systems, including his own, and he stressed that such a provision would only be acceptable if the definition of a cultural object were very narrow.

66. Some representatives emphasised the need for clarity in paragraph 2 which sought to circumscribe the notion of necessary diligence and set out certain factors to be taken into consideration in determining its existence. They were reminded that the provision was intended only to be of an indicative character and that it did not lay down precise legal rules in as much as it offered an indirect description of good faith, without employing that specific term in view of the wide differences among national laws on this point. Some representatives nevertheless proposed adding other criteria for the determination of the exercise of the necessary diligence by the possessor, such as for example the civil or commercial character of the parties, or the nature of the cultural objects.

67. The consultation of an accessible register of stolen cultural objects was seen as another factor in determining whether the possessor had exercised the necessary diligence and some representatives who supported the introduction of such a condition suggested further clarifying the reference to the register by adding the words "official or authoritative", or "reliable" (cf. Study LXX - Doc. 24, p.6). Another representative recalled that there existed in Canada a list of cultural objects, the export of which was controlled, established pursuant to Article 4 of the Canadian Cultural Property Export and Import Act and that consultation of this list by a prospective purchaser of an object would alert him or her to whether or not the export or import of such objects was controlled and, where it was so controlled, to act in full knowledge of the situation. She also stated that Canada was interested in establishing a data base that would

contain the texts of the cultural heritage statutes and regulations enacted by various countries which would be made available to other States as part of the Canadian Heritage Information Network (CHIN), a public access network containing a comprehensive inventory of Canadian museum collections as well as a register of stolen art and artifacts. Canada also envisaged the setting up of databases on cultural property seized by police or customs officials. With a view to taking into consideration such initiatives which no doubt other countries were also contemplating, the Canadian delegation proposed adding to the reference to the register one to "the relevant legislation of the requesting State and other relevant information" (cf. Study LXX - Doc. 29, Misc. 33 rev.). This proposal met with a favourable reception on account also of the existence of registers of protected or inalienable cultural objects which many States had begun to set up with a view to the implementation of the provisions of the 1970 Unesco Convention (cf. Study LXX - Doc. 25).

68. Finally, the committee considered the difficult question dealt with in paragraph 3 of the position of a person who had acquired an object by inheritance or otherwise gratuitously and for whom it might be impossible to know the circumstances in which the donor had acquired the object. One representative believed that this paragraph should be redrafted so as to attenuate for the heir or person who had otherwise gratuitously acquired the object in good faith some of the prejudicial consequences of the assimilation of his position to that of the previous possessor who might sometimes even have been the thief himself.

69. The committee considered that the corresponding wording on this point of the draft EEC Directive, which was itself based on earlier Unidroit texts, was preferable as it conveyed much more clearly the idea that the possessor should not be in a more favourable position than the person from whom he had acquired the object by inheritance or otherwise gratuitously.

70. Since this paragraph in effect imposed upon the heir the burden of proving the "good faith" of the donor even when the acquisition had taken place many years before, the United States delegation proposed specifying in Alternative B of Article 4 (cf. Study LXX - Doc. 29, Misc. 16 and 16 Add.) that the first acquisition should have occurred after the entry into force of the Convention. While believing that it might be appropriate to impute to the beneficiary or to the heir the conduct of the previous possessor, this would not be the case when the predecessor had acquired the object many years before. It also pointed out that practically no gratuitous beneficiary would be able to exercise the same degree of diligence in respect of cultural objects acquired long before and received as gifts.

71. In conclusion, one representative considered that a new paragraph should be included in Article 3 corresponding to the type of

provision already to be found in Article 8 (3), namely that expenses incurred in restoring the cultural object should be borne by the requesting State (cf. Study LXX - Doc. 29, Misc. 22).

72. On second reading, the committee was called upon to consider two alternatives for Article 4, the first following the original text and establishing the principle of compensation for the possessor if he could prove that he had exercised the necessary diligence, while the second laid down the opposite principle with reimbursement of expenses incurred for the conservation or for the protection or restoring of the object (cf. Study LXX - Doc. 29, Misc. 37 rev.). In the vote on the question of whether or not the notion of compensation should be retained, 20 delegations voted in favour and 10 against with six abstentions.

73. As regards the proposal that the possessor should be reimbursed for the expenses incurred in the protection or restoring of the object, 10 delegations voted in favour of such a provision and 14 against with 13 abstentions.

74. The representative of Finland asked for a vote on his proposal for a new paragraph 4 contained in Study LXX - 29, Misc. 40 and worded as follows: "The provisions of this article do not apply when a possessor, under the law applicable, shall return the cultural object without compensation". In view however of the fact that this proposal introduced a new idea which had not been discussed by it, the committee considered that it would be inappropriate to proceed to a vote at that time.

75. Before the conclusion of the discussions on Article 4, the representative of Iran suggested that in order to introduce a measure of order into trade in works of art and to combat the black market and illegal trafficking, his delegation was proposing the establishment by each State of a certificate for cultural objects of special significance. Such a certificate or identity card would indicate the characteristics of the cultural object and provide particulars concerning the identity of the owner and the possibility of its being imported or exported. The Iranian delegation believed that such a certificate would assist authorities in exercising a more rigorous control over transactions and permit the recovery of taxes and other fees which would finance the scheme. It would moreover assist customs authorities, for example at the level of import control, as such imports would be prohibited in respect of cultural objects not accompanied by the certificate, and would allow a certain control over exports thus rendering redundant the present export certificates used in certain countries. The Iranian delegation in conclusion believed that such a uniform certificate could be drawn up by Unidroit.

76. One representative responded with enthusiasm to this proposal, stating that it would receive the full support of museums. Another however suggested that the creation of such an international certificate could pose

substantive and financial problems for States while yet another stated that he was for his part firmly opposed to such a control of the import or export of cultural objects as his country had an entirely different concept and philosophy of international relations and favoured the free movement of goods, a category to which cultural objects belonged. If however one were to envisage a special regime for cultural objects any form of import control would be excluded for his country if it were to apply to any cultural object whatsoever declared to be such by the requesting State.

CHAPTER III - RETURN OF ILLEGALLY EXPORTED CULTURAL OBJECTS

Article 5

77. A number of representatives indicated on various occasions during the discussions on stolen cultural objects that they would like to see a regime parallel to that for illegally exported objects and that in consequence the principle of the obligation to return such objects should be enunciated before dealing with procedural questions. It was in this perspective that the Greek delegation proposed a new paragraph 1, worded as follows: "The possessor of a cultural object which has been illegally exported from the territory of a member State shall return it to that State." (cf. Study LXX - Doc. 29, Misc. 1).

78. The innovatory character of Chapter III in general was referred to on a number of occasions, in the sense that a State which ratified the Convention would undertake to respect the principles underlying foreign rules concerning illegal export, and in view of this innovation certain representatives underlined the necessity of clearly delimiting the notion of illegal export. The discussions on this point which had taken place in connection with Article 1 were recalled and one representative expressed the view that here also it was preferable not to specify the kind of legislation in question so as to avoid conflicts of characterisation or too restrictive an application as there were many ways in which a cultural object might be removed from the territory of a State. Various drafting proposals were made in this connection, for example "contrary to its legislation", "contrary to its law applicable to the protection of cultural objects", or again "contrary to its applicable law". The use of the word "export" was itself criticised on the ground that it was a technical term whereas the idea which the text sought to convey was simply the physical transfer of the object.

79. The United States delegation proposed the following wording which it had already submitted at the first session of the committee of governmental experts (cf. Study LXX - Doc. 22, Misc. 6): "contrary to a legislative provision prohibiting the export of cultural property because of its cultural significance". The United States concern, which was not one only of drafting but also of substance, was to assist the draftsmen of

such legislation in those countries from which cultural objects might be illegally exported, as well as importing countries in the determination of the grounds of the illegal character of the export. Another objective was to recall that the application of the Convention should be limited to objects of a certain importance. One member of the study group however stated that there was a certain link between paragraphs 1 and 3 of the article, which would be modified by the United States proposal. The idea of the study group had been to establish in paragraph 1 the principle of return without reference to the conditions of application which were to be found in paragraph 3, and the proper place for such a provision seemed therefore to be in this latter paragraph.

80. Another representative suggested that the revised version of Article 5(1) submitted by his delegation sought precisely to define in its third sub-paragraph the infringement of export legislation and thereby the reasons for the illegal character of the export (cf. Study LXX - Doc. 27). He wished to emphasise in the first place that there must be a breach of substantive provisions and in the second place that the existing text did not speak of export procedures and he believed that the breach should be defined in the Convention itself and not only in a commentary on the text.

81. The words "or other competent authority" were subjected to criticism by one representative who believed that there should in all cases be judicial proceedings and not the intervention of an authority which might be influenced by political considerations and unfamiliar with the notion of an appeal. Another representative supported this idea and recalled that the revised version of the Convention submitted by his delegation had deleted in Article 5 and in other provisions the reference to another authority.

82. For his part one representative believed that the notion of "other competent authority" should be further developed and he proposed the adoption of a mechanism whereby a duly appointed central authority to be designated by each State at the time of its ratification of the Convention would centralise and transmit requests for return and communicate information. He recalled moreover that such a mechanism was to be found in the draft EEC Directive and that it was based upon the 1980 Convention on international child abduction. The system envisaged by Chapter III would lead sovereign States to plead before a judicial authority, which was not perhaps a position in which they would normally find themselves, but he believed that unless the reference both to a court and to some administrative authority were to be deleted, and just arbitral proceedings to be contemplated, the only solution would be to oblige a State to appear as plaintiff, which was not evident from a first reading.

83. This rather extraordinary situation in which a State would find itself of pleading before the courts of another State troubled the German delegation which suggested that it be stated expressly in the paragraph

that it would be for the possessor to return the illegally exported object to the requesting State (cf. Study LXX - Doc. 27). What was necessary was to make known to the claimant to whom he should turn to seek the return of the object under the Convention, and it would be more practical to contemplate an action only against the possessor. The practical implications of such a proposal would concern the amount of the compensation and State immunity. The same representative pointed out moreover that the first reference made to the possessor was in Article 8 and that it would be preferable for mention of him to be made already in Article 5.

84. One representative however believed such an interpretation to be too narrow as in certain circumstances an action would not be brought against the possessor, in particular when the State in question made provision under its law for forfeiture of objects in the event of an infringement of export legislation, in which case the object would be returned under an inter-State action, for which no provision was made in the German proposal. One member of the study group suggested that it was intentional that the present text was not more precise, and that a State was free to provide in its legislation implementing the Convention whether the action should be brought against a State or the possessor. Another representative expressed a preference for the existing text which did not in any way prejudge the decision to be taken in any given case in the State addressed, and which avoided problems of definition of terms such as "possessor" or "holder". Yet another considered that it would be simpler to retain the existing text since she believed that what was at issue was not an action against a State but rather that a State would, through its courts, be called upon to secure the return of an illegally exported object. Finally, one other representative stated that he could not support entirely the suggestion for what was important in paragraph 1 was that a State was seeking to obtain the return of an object, without specifying how it should be returned and from whom. A form of drafting as precise as that proposed by the German delegation would lead to complications in the application of the future Convention since it would from a procedural point of view signify that there must be a specific procedure against a given possessor, and it would be necessary to recommence proceedings if the possessor were to change.

85. In conclusion the committee believed that it was premature to take a decision at this stage on the question since a number of delegations needed further time to evaluate all the implications of the proposal. One representative however indicated that the problems which had been raised led him to believe that it would be preferable to contemplate two separate provisions, the first establishing the obligation of the State addressed to return the cultural object and the second dealing with procedural questions such as how the claim should be brought and against whom, and eventually to fall back on the idea of a central authority of the requesting State which might bring an action when so authorised by the owner.

86. At the first session of the committee of governmental experts one member of the study group had recalled the purpose of paragraph 2, which laid down the conditions for admissibility of a request, so as to dispel certain misunderstandings which seemed to have arisen; a majority of representatives however, who had not been convinced by those explanations, called for the total or partial deletion of the provision. A similar sentiment emerged from the written observations of Governments and from the statements of representatives at the second session.

87. Some representatives preferred the total deletion of the paragraph, one because it departed from the fundamental objective of the Convention and another on the ground that it was unnecessary given the enumeration in paragraph 3; it was indeed astonishing that the same obligation should at the same time constitute a substantive condition and, from a procedural point of view, be a condition for the admissibility of the request. Another representative was of the opinion that it was impossible to impose on a requesting State an obligation to satisfy certain additional conditions over and above the basic one that the cultural object in question had been illegally exported from the territory of the requesting State. He insisted that it was sufficient that the documentation supporting the request allow the competent authority of the State addressed to determine whether or not the object had been illegally exported. Other representatives called for the deletion only of the second part of the paragraph and in consequence the committee decided to consider separately the two parts of the provision which were underpinned by different philosophical considerations.

88. The first part of the provision concerning the documents to be produced when making a request ("to be admissible.... are fulfilled") found a certain consensus among the representatives, all of whom agreed that the production of supporting documents was a normal procedure which had moreover been adopted in a number of Conventions on mutual assistance with a view to facilitating their implementation and to offering a certain degree of security. Any request emanating from a foreign State should always be accompanied by the relevant information. Moreover, many Conventions established a system whereby claims were channelled through an authority of a Contracting State and in some respects they had gone even further, as was the case with requests for letters rogatory and service abroad of judicial documents.

89. While approving the philosophy underlying this first part of the provision, some representatives wished to delete the reference to admissibility (cf. for example Study LXX - Doc. 29, Misc. 5). They believed that if agreement were to be reached, as was the case in most Conventions setting up a system of mutual assistance, that a requesting State should have to provide certain information permitting the State addressed to take a decision on the request, the question of the substantive consideration of

the request should not be confused with that of admissibility which was a matter for the *lex fori*.

90. Two representatives also suggested the addition of the words "to a court or other" to "competent authority" so as to bring the wording into line with that of paragraphs 1 and 3 (cf. Study LXX - Doc. 29, Miscs. 5 and 8).

91. The second part of the paragraph providing that the request must "contain all material information regarding the conservation, security and accessibility of the cultural object after it has been returned to the requesting State" met with strong opposition. In this regard one member of the study group once again recalled the reasons which had led the group to include that provision. The first had been a desire to enhance the credibility of the requesting State by asking it to motivate the request for return by demonstrating the significant cultural interest of the object and not only the fact that it belonged to its national heritage. The second reason was the psychological effect which the provision might have on the requesting State which would be obliged to take the necessary steps to ensure the protection of the cultural object whose return it was requesting. Finally, the study group had been of the opinion that if the State addressed were to be called upon to recognise the public law of the requesting State, which was after all a foreign State, it would be advisable, and in the interest of the requesting State, to require in return a moral undertaking on its part. It was certainly not a question of creating obstacles for the return, nor of refusing to apply the principle of return on the ground that the State addressed would be better placed than the requesting State to protect the object.

92. While having some degree of sympathy for those ideas, most representatives nevertheless favoured the deletion of this part of paragraph 2. They believed that there were no universally recognised rules to that effect and that most often a State would be acting on behalf of private persons on whom it would be impossible to impose conditions of accessibility. Others considered that while the provision might be useful, it would create difficulties with regard to the free determination by the State owning the object of its future use, while others characterised the obligation ("shall contain . . .") as being degrading. Moreover some representatives raised the question of how to verify whether the requesting State had discharged the obligation and what would be the sanction in the event of its failing to do so. In fact, the text did not expressly provide that the State addressed could refuse the request for return whenever the proposed measures of conservation, security and accessibility were not satisfactory, and even if one were to make provision for that option it would still be necessary to specify to whom those measures must be acceptable and the consequences in the event of the object not being returned, which could raise insurmountable difficulties.

93. Given the importance of the aim of the provision, some representatives sought to find compromise solutions. One of these was to establish an obligation for the requesting State subsequently to return the object to the State addressed if the conditions laid down in the second part of paragraph 2 were not satisfied and to that end the following text was proposed: "The court or competent authority shall require the requesting State to return the cultural object if that State does not satisfy the conditions set out in paragraph 2." Another possibility suggested was to draw up a separate provision, at the same time more limited but more stringent, which would take the form of a kind of general clause indicating the grounds on which the State addressed might refuse the return if the conservation, security and accessibility of the cultural object were not guaranteed. The representative making that proposal considered the aim of the provision to be so important that it would not be sufficient to refer to it in an explanatory report. One last suggestion made with a view to avoiding the deletion of the provision consisted in taking it out of the substantive provisions of the text and inserting it in the preamble which would contain a declaration according to which the States Parties would be prepared to make significant changes to their national law so as to ensure the conservation, security and accessibility of cultural objects and guaranteeing their return in the event of theft or illegal export (cf. Study LXX - Doc. 25).

94. One representative pointed out that if the provision were, as he proposed, to be deleted, it seemed that recourse could in any event be had to Article 11(b)(i) whenever the conservation, security or accessibility of a cultural object was at issue in any judicial proceedings.

95. As had been the case with paragraph 2, a large number of representatives called for the deletion of paragraph 3 which subordinated the return of an illegally exported cultural object to certain conditions which took the form of a list of interests which might be impaired by the export. They advanced the same reasoning as for the previous paragraph, namely that the return should be subject to no condition whatsoever other than proof of the infringement of a law, and in consequence the illegal character of the export. While recognising that those interests might be favourable to the requesting State for the protection of a cultural object, they nevertheless believed that they should not constitute a formal condition for return.

96. One representative considered that if the term "cultural object" were to be defined in such a way that each State would define its own cultural objects, and given that claims for the return of cultural objects were not brought lightly in view of the costs involved, paragraph 3 would no longer be necessary. She emphasised moreover that the position both in Canada and Australia was that no conditions were attached to the return of a cultural object apart from the infringement of the legislation of the requesting State. Another representative feared that a reader not

familiar with the text might conclude that it was not laying down conditions for the return but rather restrictions on the principle and the right to return.

97. For their part a number of representatives believed that the presence of such a provision was a condition *sine qua non* for broad acceptance of the Convention and while it would be desirable to move in the same direction as Canada and Australia, other systems were much less progressive. To be true, this paragraph constituted a substantial change in the existing state of the law, but it would permit a certain degree of comparison between export laws which, unlike those relating to theft, differed considerably, and the establishment of a balance between the legitimate interests of the parties. In their opinion it was necessary that the conditions laid down in paragraph 3 should be justified by proof of the existence of as powerful an interest as that justifying the return of the object, namely its cultural importance. They suggested that the principle of respect for the law of the State of origin should be affirmed, but that the concerns underlying that law and especially its application to cultural property should be verified by a judge of the State addressed. In fact no State would be prepared to recognise or to have regard to the rules of public law of another State in the absence of any form of control.

98. Some members of the study group thought it useful to recall the purpose of paragraph 3 which had not been to give added weight to the export control laws of a certain group of States by applying the principle of return to all cultural objects illegally exported from their country of origin, but rather to strike a balance between the legitimate interests of different groups of States. The list established included interests deemed to be worthy of protection in as much as it delimited the categories of cultural objects to which States believed it necessary to accord protection above any other consideration. Paragraph 3 was in fact the only provision which allowed the State addressed to exercise a measure of control and to verify respect of the cultural objective of the Convention.

99. While understanding these considerations, some representatives proposed compromise solutions with respect to the original text whose form of wording, and in particular the list of interests, was seen as being unsatisfactory in that it risked giving rise to problems of application and interpretation. One of those representatives believed that it would be difficult for a judge objectively to determine whether the conditions set out in paragraph 3 had been satisfied and he proposed giving an exhaustive and objective definition of cultural objects in Article 2 which would permit the deletion of the conditions listed in that paragraph (cf. Study LXX - Doc. 29, Misc. 23). While some representatives were attracted by this proposal which evidenced the close link between the definition of a cultural object for the purposes of the Convention under Article 2 and the interests enumerated in Article 5, others found it to be unacceptable as no State would accept a change to its domestic law obliging it to return any

kind of cultural object since the present definition was far too wide, and because a State would only accept the principle of return in certain circumstances whose existence it would reserve the right to determine. Reference was also made to Article 11 which would permit those States which so wished to be more generous and to assume a more stringent obligation to return cultural objects.

100. Another representative, who believed that the only proof that needed to be brought by the requesting State was that of the infringement of its export legislation, proposed the deletion of the word "prove" and that it be replaced by language requiring the State addressed to "take into consideration" certain interests which restricted the definition of cultural objects for the purpose of Chapter III (cf. Study LXX - Doc. 24, p. 7). Another representative feared that the provision could cause problems of application for it would sometimes be very difficult to prove the impairment of one of the interests set out and it called for a more flexible formula. One member of the study group however replied that the group had, when drawing up the text, been of the opinion that it would be easier to satisfy this evidentiary requirement than that of the ownership of an object under the existing system, a burden of proof which was moreover rendered more onerous by the fact that the concept of ownership might be different in the two States. He insisted on the fact that the provision sought to facilitate the bringing of proof and above all the admissibility of the request. Another representative proposed removing the burden on the requesting State to prove the impairment of one of the interests, leaving it to national law to determine the procedure since it was not intended here to harmonise proceedings or rules regarding proof. This proposal however, as well as those designed to replace the word "proof" by "take into consideration" or "show", met with opposition from other representatives who feared that the text would lose in clarity and that there would be uncertainty as to its interpretation.

101. Another proposal was made along the lines of that which had been made in respect of Article 2 to the effect that the words "cultural objects" should be defined by each State. The Canadian delegation in effect suggested that it should be sufficient for the State addressed to order the return of the object that the requesting State declare that the object was of outstanding significance or that it prove that the export of the object would impair one of the interests mentioned (cf. Study LXX - Doc. 29, Misc. 10). However some representatives expressed the most serious doubts as to whether a State addressed would be willing to return an object simply on the basis of a declaration by the requesting State.

102. For his part another representative expressed support for maintaining the requirement of proof, but wished to go further than in the proposal made by his delegation at the first session, namely that the requesting State must prove that the object had been listed as one whose export was subject to authorisation (cf. Study LXX - Doc. 23, paragraph

109). He believed that the enumeration of the criteria obliging the State addressed to order the return of an illegally exported cultural object should also include conditions corresponding to the purpose of the draft Convention set out in Article 1, namely that it applies to requests by States for the return of cultural objects removed from their territory contrary to its export legislation, and corresponding also to the condition laid down in Article 5(1) concerning the bringing of a request before the State addressed for the return of a cultural object, namely that it had been exported contrary to its export legislation. He therefore deemed it necessary to complete Article 5(3) as follows: "The court or other competent authority of the State addressed shall order the return of the cultural object to the requesting State if that State proves that the removal of the object from its territory was contrary to its applicable [export] legislation and that the removal of the object from its territory significantly impairs one or more of the following interests: ..." (cf. Study LXX - Doc. 29, Misc. 4).

103. A number of proposals were made for the deletion of sub-paragraph (e) concerning the outstanding cultural importance of the object for the requesting State and for its insertion in the introductory part of the paragraph. One representative in particular pointed out that the word "significance" already appeared in Article 2 and that the indirect qualification in a sub-paragraph of Article 5(3) was in consequence redundant. Those members of the study group who were present recalled however the importance of such a provision which permitted cases to be covered which would not otherwise be caught by the Convention.

104. The committee then considered the problem of clandestine excavations after one member of the study group had, when recalling the purpose of the five sub-paragraphs of paragraph 3, stated that sub-paragraph (c), and in particular the words "for example, a scientific or historical character", had been included so as to take account of clandestine excavations in archaeological sites so that an object discovered during such excavations would *ipso facto* be considered as belonging to the category described by the sub-paragraph. The discussions centred in particular on the question of whether it would be preferable to have a separate provision in the text dealing with the matter, or whether it was sufficiently covered in the existing draft, in Article 5(3)(c) and/or in Article 2 which spoke of objects of cultural significance which naturally included archaeological objects.

105. While all representatives were in agreement that such practices should be condemned and as to the purpose of a provision in this regard, views differed as to how this should be achieved. Some representatives indeed made proposals to the effect that cultural objects originating in clandestine excavations should be deemed to have been stolen and in consequence susceptible to automatic restitution under Chapter II (cf. Study LXX - Doc. 22, Misc. 11). Another suggested adding to objects

originating in clandestine excavations those illegally disposed of following authorised excavations. Yet others believed that such a provision should appear in Chapter III because their legislation provided that an illegally exported object would automatically become the property of the State while another representative suggested a form of wording to be inserted in Article 5 on the proof to be adduced by the requesting State (cf. Study LXX - Doc. 29, Misc. 12), although it seemed to him to be more natural and appropriate to include a provision relating to illegal excavations in Chapter I by adding a phrase to Article 1.

106. A majority of delegations however came to the same conclusion as had the study group, namely that it would be preferable to leave a certain degree of discretion not only to the judge seized of the case, but also to the requesting State according to the circumstances, to found its claim for restitution or return either under Chapter II or under Chapter III, all the more so as in most cases the cultural object would have been stolen and then illegally exported. A more or less general agreement was reached among the delegations to the effect that the solution most favourable to those States which were victims of clandestine excavations would be to leave to them the choice of invoking either Chapter II or Chapter III, or both of them at the same time. The committee believed that in those circumstances it would no longer be necessary to add a separate article dealing with illegal excavations, which did not however signify that they ought not to be mentioned in Article 1, in the preamble or in the title.

107. One representative pointed out that the three paragraphs of Article 5 provided that the illegally exported object should be returned to the requesting State. He proposed deleting this reference to the requesting State as this might not be appropriate in all cases, especially when such was not the wish of that State. He therefore suggested following the wording to be found in Chapter II in Article 3, which referred to return without any other specifications (cf. Study LXX - Doc. 29, Miscs. 3, 13 and 34). One member believed that the problem could be solved by a reasonable interpretation of the existing text, but the committee nevertheless referred the matter to the drafting committee.

108. Finally, one representative recalled the fears, already expressed at the first session of the committee (cf. Study LXX - Doc. 23, paragraph 116), regarding a possible incompatibility between the present text of Article 5(3) of the Unidroit draft and Article 30 *et seq.* of the EEC Treaty. In effect, the present draft contemplated the return of cultural objects in many more cases than those envisaged by the Community texts, and the representatives of the member States of the European Economic Community wondered how the two instruments might be reconciled, for if a maximum level of protection had been laid down within the Community, they could not accept a higher level of protection. Representatives of other States, whether or not members of the European

Community, drew attention however to the fact that it was frequent in private international law for States Parties to a regional agreement to sign another international Convention imposing different obligations. It was furthermore stressed that the objectives of the two instruments were different, the one establishing a regime of protection and the other the principle of free movement. Moreover, the draft Directive of the EEC was concerned essentially with relations between States whereas the preliminary draft Unidroit Convention also contemplated relations between individuals.

109. The committee then took note of a proposal by the Iranian delegation for the insertion in Article 5 of a provision to the effect that the Contracting States prohibit the import of cultural objects in the absence of an authorisation issued by the State of origin for those objects (Study LXX - Doc. 29, Misc. 23), a proposal which took up an idea already put forward by that delegation during the discussion of Article 4 (cf. paragraphs 75 and 76 of this report).

110. The Italian delegation believed that steps should be taken to ensure that the Convention be an instrument safeguarding cultural interests impaired by the infringement of national laws relating to export or the protection of cultural objects, or by subsequent export from another State in violation of multilateral agreements governing the movement of cultural objects between different States, including the first two States. In such circumstances (and while avoiding that a court of a third State be called upon to determine disputes involving other States), that delegation suggested that it be provided that in place of the State directly concerned by the breach of its law, and only if that State either did not or was unable to bring any action for recovery, the other State with an interest in the question might bring an action for recovery subject to all the other requirements established by the Convention. The proposed text was the following: "The claim may also be brought, in conformity with the provisions of Article 5(2) and (3), by a Contracting State from whose territory a cultural object has been legally exported when, following one or more subsequent exports not contemplated by law or by the export authorisation of that State or by an international agreement, the same effect is produced as would have been by the illegal export of the object to a Contracting State or by an infringement of cultural interests protected by the conditions which would have permitted the export of the object".

111. Finally a proposal was made by the German delegation for the introduction in Article 5 of a new paragraph as follows: "Each Contracting State shall ensure that the individual against whom the request for return of the object could be made also receives effective legal protection before independent courts in clarifying the question of whether the object concerned does represent a national treasure for the Contracting State."

112. On second reading the committee considered the text submitted by the drafting committee which took the form of two alternatives: the first of these followed the original text with certain language placed between square brackets and three variants for paragraph 3 which took account of all the proposals which had been made, while the second alternative reflected the idea expressed by the Iranian delegation (cf. Study LXX - Doc. 29, Misc. 37).

113. The first language placed between square brackets in paragraph 1 was "or other competent authority" which a number of representatives had suggested deleting. This proposal was put to the vote, six delegations favouring the deletion of the words while 25 preferred to retain them and five abstained. The committee noted that the question would arise later for the Contracting States of specifying what were those competent authorities.

114. The committee took no decision on the retention of the words "to the requesting State" in paragraphs 1 and 2, preferring to return to the question in connection with Article 6.

115. After deferring for the time being any decision on the words "to be admissible", the committee was called upon to vote on a proposal made by certain representatives to delete the whole of paragraph 2. 11 delegations supported this proposal, while nine voted in favour of its retention subject to certain minor amendments and seven abstained. One representative pointed out that the deletion of paragraph 2 would have no great practical importance since by virtue of paragraph 3 it would be inconceivable that a court would take a decision on a request for return if it were not accompanied by certain information. In the absence of any formal decision to delete paragraph 2, the committee voted on the retention of the second part of the paragraph ("and shall contain all..."): three delegations only supported the retention of the original text while 23 voted for the deletion of the last part of the paragraph and six delegations abstained.

116. Paragraph 3 was submitted in the form of three variants, the fundamental difference however concerning the level of proof to be adduced by the requesting State. One variant in effect reflected the Canadian proposal to remove the need for any proof whatsoever since it would be enough for the requesting State to declare that the object was of outstanding cultural significance. The other alternatives made provision for different degrees of proof but the committee was called upon to vote first on the Canadian proposal for if it were to receive sufficient support it would be unnecessary to consider the type of proof which must be adduced by the requesting State: 17 delegations considered that a declaration was sufficient while 17 preferred to retain the existing text and the requirement of proof and one delegation abstained.

117. One representative recalled that he had made a compromise proposal under which the State addressed could ask the requesting State to present a decision or other determination from the court that the removal of the object had been illicit (cf. Study LXX - Doc. 29, Misc. 48). It was however decided not to put this proposal to the vote as it had not been considered by the committee.

118. The committee then turned to Alternative II containing the Iranian proposal (cf. Study LXX - Doc. 29, Misc. 23): 16 delegations supported the proposal, 16 voted against it and two abstained.

119. The Italian delegation stated that it wished to revise its proposal and to provide a more detailed explanation, for which reason the committee took no decision on document Misc. 35 at this stage.

120. Finally, the German delegation likewise believed that an indicative vote on its proposal for a new paragraph 5 would have no sense as the ideas reflected in it had yet to be discussed by the committee which therefore decided to return to the matter at its third session.

Article 6

121. The possibility to refuse to order the return of a cultural object because it has as close a, or a closer, connection with the culture of the State addressed or of a State other than the requesting State, gave rise to widely different reactions among the members of the committee of experts, in particular in connection with the reference to the "other State". The Chairman therefore suggested discussing in the first instance only the principle of refusal in the event of there being as close a, or a closer, connection with the culture of the State addressed, leaving for subsequent consideration the question of third States.

122. Notwithstanding agreement as to the fact that the same object might be part of the cultural heritage of more than one State, which was moreover explicitly recognised in Article 4 of the 1970 Unesco Convention, some representatives believed that Article 6 gave security to the illegal export of cultural objects from countries with certain common cultural characteristics, and that it was in addition incompatible with the 1970 Unesco Convention and with Chapter II of the draft itself on the restitution of stolen objects, and in consequence they supported the deletion of the provision as a whole. It was also pointed out that it would be unacceptable for a court to refuse to order the return simply because it "finds" something to be the case, without the necessity of any proof being brought. Another representative drew attention to the difficulty which such a provision could create for countries with a perhaps rather complex but nevertheless well established procedural system and to the fact that the Convention which would only be acceptable in the absence of Article 6.

123. One delegation questioned the utility of including in the Convention a provision which would permit the State addressed to refuse to return an object designated by the requesting State in its legislation as one whose export was illegal. It suggested that if the article were to be retained, the language should be amended in the following way so as to avoid the apparent contradiction with Article 5(3): "...may nevertheless refuse to order the return ..." (cf. Study LXX - Doc. 24, p. 4).

124. Another representative also suggested that the article might be amended in such a way as to provide that even if the judge had found that the object had a closer connection with the State addressed, and therefore refused to order the return of the cultural object, he could provide for the payment of equitable compensation to the State whose law had been breached. One member of the study group replied that this idea had no place in Article 6 for if the cultural object had been stolen and illegally exported, the question of compensation would fall to be determined under Chapter II, whereas if the object had only been illegally exported, the requesting State to which the return of the object was refused would most often not be the owner and would therefore have no right to compensation.

125. This notion of ownership was invoked on a number of occasions during the discussion as some representatives believed that the article was in contradiction with it. The members of the study group however insisted that while the problem might arise in connection with Chapter II, it was irrelevant to Chapter III which was concerned with the infringement of export legislation and not with rights of ownership.

126. A majority of members of the committee of experts however believed that although it might be necessary to review the language of the article, it was nevertheless necessary that it be retained in the text so as to limit the measure of discretion of national judges in relying upon the notion of public policy (*ordre public*) which was not only a legal concept but in part an emotive one and which would in any event be invoked. It was recalled that it had been a concern of the study group to subject political and cultural factors to as close a control as possible. One representative also suggested that this article constituted a genuine guarantee for the requesting State, because, although it did not perhaps permit a limit to be placed upon the exercise by the judge of the notion of public policy, it nevertheless had the evident advantage of allowing to the judge of the State addressed only one possible ground for refusing the return.

127. The words "as close a, or a closer, connection" which provided the criterion for a refusal to return an object were criticised as being too vague and imprecise. Some representatives therefore suggested that the "connection" be "manifestly closer" in view of the very extensive notion of culture (cf., for example, Study LXX - Doc. 29, Misc. 19 rev.). Another representative was of the opinion that mention should be made of the

factors to be taken into consideration by the judge when determining the existence of the connection so as to avoid arbitrary decisions. The Israeli delegation proposed adding to paragraph 1 the words "according to the interests specified in Article 5(3)," so as to assist the judge in determining the interests of the requesting State and of the State addressed (cf. Study LXX - Doc. 29, Misc. 14). It was also suggested that a distinction be drawn between the use of the concept of "closer connection" in the draft, which provided a ground for refusing the return of an object, and its use in for example the Hague Conventions for the purpose of determining the applicable law. Some representatives proposed deleting the words "as close a" which presented a difficulty from the point of view of judicial technique as the judge would when deciding a given case have to give priority to a closer connection and not to one as close.

128. Some members of the committee recognised that the "closer connection" was in this context somewhat different from that contemplated in private international law, although there was a certain analogy between this concept as employed in Article 6 and the usual notion of public policy which always constituted an exception to a principle, in as much as Article 6 was an exception the application of Article 5. With regard to the view of some representatives that the "closer connection" should be defined, it was recalled that Article 4 of the 1970 Unesco Convention specified the factors to be taken into consideration by a State when deciding which objects belonged to its national heritage, and it was suggested that this list could serve as a basis here also.

129. A number of representatives however believed that the sole criterion of the close connection justifying a refusal of return would be too vague if the idea was that of creating a "restricted" public policy. One of them suggested that it would be necessary to add to the criterion of the connection with another culture a second one according to which the return would be manifestly contrary to the fundamental principles on the protection of the cultural heritage of the State addressed (cf. Study LXX - Doc. 29, Misc. 34). Other representatives however did not find such a direct illusion to public policy to be appropriate since it encompassed more a factual concept than a legal one which differed from one country to another. A joint proposal was then made in a spirit of compromise the effect of which was to add to the notion of the closer connection the idea that the return "would be manifestly contrary to the moral obligation of the State addressed to protect its cultural heritage" (cf. Study LXX - Doc. 29, Misc. 43).

130. While conscious of the fact that the notion of culture is not necessarily based on a territorial link, but at the same time anxious that this aspect should not be overlooked, the Turkish delegation proposed that the territorial rights of a requesting State be protected by adding a further condition to the refusal of return, namely that "the object is proven to be removed from its original context on the requested State's

territory" (cf. Study LXX - Doc. 29, Misc. 20). This territorial concept was also taken up by a number of delegations in a joint proposal the purpose of which was to add to the criterion of the closer connection that of the territorial origin of the object (cf. Study LXX - Doc. 29, Misc. 19 rev.).

131. The committee then examined the question of whether regard should also be had to the interests of third States as a ground for refusing to return an object, together with the practical implications of its application. One representative stated his opposition to taking account of the interests of a third State as that would entitle a court or a national authority to return a cultural object to a third State on the sole ground that it had refused to return it to the requesting State. Another representative believed that no mention should be made of a third State, even at the time of refusal, since to do so would depart from the purpose of the future Convention which sought to secure the return of a cultural object illegally exported from one State to another and that the situation would be complicated by allowing the intervention of a third State seeking to assert its close connection with the object.

132. One member of the study group moreover recalled that it should not be forgotten that the claim brought under Article 5 concerned the infringement of export legislation. If there had been a breach of the legislation of a third State it would be entitled to bring an independent action, but if there had been no such infringement it was difficult to see how, in the context of Chapter III, a judge could have regard to the interests of a third State with a view to protecting its cultural heritage, and it did not seem possible to envisage a third State bringing an action on the basis of a breach of the legislation of another State. Finally, he pointed out that one would be requiring the judge to take a very delicate decision in that he could have no knowledge of the culture of the third State which, not being a party to the case, might have presented no information in that regard.

133. While recognising the possible practical difficulties attendant upon taking into consideration the interests of a third State, a large number of representatives favoured the retention of that reference. They also believed that while it was understandable that a cultural object which had a closer connection with a State addressed should remain in the State, there was no justification, whether moral, political, or legal for the State addressed to retain a cultural object which had a closer link with the culture of a third State.

134. Some representatives were however astonished at the idea that a non-Contracting State might benefit from the provisions of the Convention and take advantage of the mechanisms established by it in circumstances where another State would have satisfied all the necessary conditions. It was therefore suggested that if any reference to a third State were to be

maintained then it must be specified that that third State was a Contracting State which would itself in appropriate circumstances be required to return cultural objects to other States. Such a restriction might moreover encourage certain States to become Contracting Parties to the future Convention.

135. In the interest of third States, one representative pointed out that if the court knew that the requesting State had a close link with the object, but that there was a closer link with the culture of a third State, that court might be embarrassed at having to return the object to the requesting State solely on the ground of the breach of its legislation, or having to retain the object although there was no particular connection with the State addressed. It was for this reason that the Irish delegation proposed that provision be made for the court of the State addressed to be able to give notice to the third State so that it might bring a claim (cf. Study LXX - Doc. 29, Misc. 28). The Chinese delegation proposed that where there was as close a, or a closer, connection with the culture of a third State, "the State addressed has an obligation to give notice regarding the return of that object to the third State without undue delay" (cf. Study LXX - Doc. 24, p. 7).

136. The Greek delegation made a similar proposal which took account of some of the concerns expressed by a number of representatives. The aim of this proposal was to allow the return to be refused when the object had a manifestly closer connection with the culture of, or had its territorial origin in, the State addressed or a third State. In the latter case, the third State would be informed so that it might bring a claim for return of the object in accordance with Article 5(3) (cf. Study LXX - Doc. 29, Misc. 19 rev.).

137. One representative strenuously opposed this proposal which would allow a judge in the State addressed to call upon a third State to intervene, by taking into consideration the cultural connection with that State even though its legislation had not been breached, for he envisaged difficulties of a cultural character (difficulties for the judge of the State addressed when the object was connected with various cultures), diplomatic (risk of creating animosity between States) and technical in relation to international Conventions (the interest of the third State to bring a claim having no relation with the mechanism contemplated by Chapter III) (cf. Study LXX - Doc. 29, Misc. 50).

138. Another representative took a similar view, adding that the proposed text sought to deal with the problem of recognition of the capacity of a claimant, which was recognised by the procedural law of each State for any State with an interest worthy of protection, and that this was unnecessary since that matter would be dealt with by Article 5.

139. The Italian delegation also submitted a proposal which attempted to deal with the paradoxical situation in which a cultural object had been legally exported from State A to State B, then illegally exported to State C; the question which then arose was that of which State should bring a claim as State B would not fulfill the conditions of Article 5(3) whereas there would have been no breach of the legislation of State A. The aim of the Italian proposal was that in place of the State directly concerned by the infringement of its law, and only if that State either did not, or was unable to, bring an action for recovery, the other State with an interest in the object could bring an action for recovery subject to all the other requirements established by the Convention (cf. Study LXX - Doc. 29, Misc. 54, Articles 5 bis and 6).

140. One representative noted that a question of substance which had yet to be considered by the committee of experts was that of a cultural object which was the subject of a claim for return but which had initially been illegally exported from the State addressed, then illegally reimported to it. He believed that in such cases the State addressed should be able to justify its refusal to return the object, even in the absence of as close a connection, on the sole ground that the object had initially been illegally removed from its territory.

141. On second reading the committee was called upon to consider Article 6 in the form of two alternatives, the first of which corresponded more or less to the original text with a specific paragraph concerning third States, while the second reflected the formula proposed by the Greek delegation. The committee was however unwilling to take any firm decision regarding the two alternatives as the second raised problems of substance which had not been examined in detail by the committee, in particular in relation to the mechanism permitting the intervention of the third State. The only question relating to this article upon which the committee voted was whether there should in principle be any reference to a third State; 13 delegations voted in favour of such a reference, 12 against and eight abstained.

Article 7

142. While the committee reached a consensus at its first meeting on the principle of the exclusion from the scope of application of the future Convention of cultural objects illegally exported during the lifetime of the person who created them or within a certain period after the death of that person, a principle laid down in sub-paragraph (a), the same was not true of the length of that period. Some representatives in effect believed that the period of 50 years after the death, taken over from the law of copyright (Berne Convention of 1886 and successive revisions), was too long. They therefore proposed a reduction of the period to 20 years, one to be found in a large number of laws concerning artists' rights, which would

moreover safeguard the heritage of the requesting State. Another representative on the other hand proposed an extension of the period to 100 years, suggesting that such a system would be more flexible and easier to apply.

143. Another representative moreover recalled that the words "export legislation" had been criticised in relation to preceding articles and that the deletion of the word "export" had been proposed. He therefore suggested that the word "exported" in sub-paragraph (a) be replaced by "removed" as elsewhere in the text.

144. The committee then considered sub-paragraph (b) of Article 7 which laid down the principle that export prohibitions concerning cultural objects were not effective abroad when the request for return had not been introduced within certain time limits. One representative criticised the rigid character of these time limits on the ground that they risked placing cultural objects in a less favourable situation than others by drawing up a uniform law which would exclude the application of national laws which were more favourable to the claimant. He acknowledged the existence of Article 11, but would prefer to see the possibility at present contemplated for each Contracting State to apply its more favourable national law converted into an obligation.

145. Most representatives favoured the retention of the shorter period, although some of them considered the period to be too brief for if a State were not to bring a claim within that period while knowing the location of the object or the identity of the possessor, that would signify that it had no interest in the recovery of the object. The starting point of the period was however the subject of discussion, and in particular the words "ought reasonably to have known", the deletion of which was proposed by a number of representatives who preferred to retain a reference only to the actual knowledge of the location of the object or the identity of the possessor. In reply to one representative who asked whether the location of the object was to be taken as being that where it was found after its cross-border removal or that to which it was to be removed, a member of the study group recalled that each State had its own definition of export which would apply in accordance with the rules of private international law. Another representative proposed, as he had done in relation to Article 3, that the starting point be the time when both the location of the object and the identity of the possessor had been discovered. Other representatives however criticised this indirect manner of providing for a longer period of limitation on the ground that it would give rise to difficulties of interpretation, and they therefore preferred to employ a more direct technique.

146. A number of representatives moreover called for a parallelism between the time limits set out in Article 3(2), especially for stolen and illegally exported cultural objects, and as they had called for the

deletion of the absolute period in that provision, they made a similar proposal for sub-paragraph (b), notwithstanding repeated warnings against the absence of any time limit. Various arguments were put forward, one representative fearing that the effect of the provision would be that an object would be concealed for a certain period of time, another representative suggesting that there should be no time limit once it had been proved that the object had been illegally exported and yet another pointing out that it would be extremely difficult if not impossible to establish the export of the object in time of war or the occupation of a particular territory. With a view to a compromise, and aware of the fact that the time limits could operate in favour of one party or the other, certain representatives proposed that, if necessary, the absolute period should be extended from 30 to 50 years. The United Kingdom delegation however criticised the lack of flexibility of the absolute time limit and proposed that it be reduced to six years with the possibility for States to rely upon Article 11 if their national law made provision for a longer period (cf. Study LXX - Doc. 29, Misc. 26).

147. One representative suggested that if there were to be any chance of obtaining the deletion of the time limit, then Article 5 of the Convention would have to be restricted to a very limited number of special cases of impairment of the cultural heritage, for example the notion of the category of objects *extra commercium*. This concept was known to certain countries, for example France for objects belonging to public collections and Spain in respect of certain religious objects but in the present state of private international law this concept of objects *extra commercium* was not recognised in all countries. One representative however expressed the view that such a proposal was unrealistic as any illegal export of an object *extra commercium* would constitute a case of theft or fraudulent acquisition and would therefore be subject to the rules governing limitation of actions in respect of theft.

148. As regards the starting point of the absolute period, the German delegation proposed that it be "from the time when the cultural object was exported or the time the object was acquired" (cf. Study LXX - Doc. 27). It was however pointed out that this proposal would not necessarily lengthen the period, as some seemed to believe, since the date of the acquisition might precede rather than follow that of the export.

149. Finally, the Israeli delegation considered that the text should take account of a rather exceptional case, namely that where a requesting State could not bring an action before the courts of the State addressed. It pointed out that a State from which a cultural object had been illegally removed to a State with which the first State had no diplomatic relations, or to an enemy State, might find itself in a position (for instance when it knew the location of the object) in which on the one hand the time limit had begun to run, but on the other it could not plead its case before a court of the State in which the object was located. It therefore proposed

the inclusion of a provision which would permit a fair arrangement until the circumstances changed whereby the words "export of the object" at the end of the sub-paragraph would be followed by: "; the time limits mentioned in this paragraph shall not apply to a State which cannot bring its arguments to the court of the State addressed, and application of the time limits concerned shall be postponed until it can bring its arguments to that court." (cf. Study LXX - Doc. 29, Misc. 29). While sympathising with the concern underlying the proposal, the committee believed that such a provision might more appropriately be inserted in the final clauses of the future Convention.

150. Sub-paragraph (c) was not discussed by the committee as it had reached a consensus that since the purpose of Chapter III was to combat illegal export, the export legislation must be the same at the time when the object left the territory of the requesting State as at the time when the proceedings were brought. Indeed it was difficult to imagine that a request for return would be brought at a time when the export was no longer illegal.

151. On second reading, the committee examined a text which was practically identical to the preceding one and which included the various proposals that had been made during the discussions (cf. Study LXX - Doc. 29, Misc. 37 rev.). The committee was of the view that there should be no vote on the time limits, either in sub-paragraph (a) or in sub-paragraph (b), as these were questions which it was customary to deal with at the diplomatic Conference. On the other hand it was important that the committee should take a stand on the retention of the shorter period and the absolute period. 25 delegations voted in favour of a shorter period, one against and five abstained. 22 delegations supported the retention of the absolute period, while 10 voted against and three abstained.

152. The committee then voted on the question of the starting point of the period, and in the first place on the question of whether the requesting State must know either the location of the object or the identity of the possessor, or whether those conditions should be cumulative: 18 delegations favoured the use of the word "or", while 13 preferred "and" and four abstained. It was pointed out that the vote was consistent with that which had taken place in respect of Article 3(2). As to the beginning of the absolute period, a proposal to add the words "or the acquisition" was supported by two delegations only.

153. Finally, the Israeli delegation asked that the committee vote on the principle contained in its proposal in Study LXX - Doc. 29, Misc. 29 as sooner or later a discussion would be held on the final clauses in which this idea might be expressed. While expressing the view that the problem

was probably nothing more than a simple question of *force majeure*, one representative considered that such a clause might, if broadly framed, permit the type of case mentioned to be covered. Seven delegations voted in favour of the proposal and four against while 26 abstained.

Article 8

154. On the occasion of the first session of the committee, some representatives were of the opinion that paragraphs 1 and 2 should be merged so as more clearly to express the intention underlying them to establish a certain progression. To this end the French delegation proposed a new formulation of the first three paragraphs of Article 8 which would make the article clearer by establishing a kind of hierarchy of the questions at issue (cf. Study LXX - Doc. 24, p. 9). Paragraph 1 of this new text laid down the principle that a possessor who knew that the object had been illegally exported would not be entitled to claim compensation, after which exceptions would be provided for, that is to say the options open to him if his knowledge of the illegal export had not been established.

155. This new formulation, which the committee as a whole found to be preferable to the existing text, did not call into question the principle of compensating the "good faith" possessor, a principle to which some had been opposed as they had been in connection with Article 4 concerning theft, suggesting that the possessor should not be compensated, but only reimbursed for the expenses incurred in the protection and restoring of the object (cf. Study LXX - Doc. 29, Misc. 23). Another representative believed that the case of a "good faith" possessor in circumstances of this kind was nothing more than a hypothetical one and, if this were the case, the possessor would be able to invoke the law governing his relations with his predecessor so as to determine whether he was entitled to compensation but he should not be able to claim such compensation from the State which had been the victim of the illegal export. For this reason she proposed introducing a provision of the same kind as that suggested for Article 4, namely "The rights of the *bona fide* possessor *vis à vis* his predecessor are reserved".

156. The Italian delegation proposed adding a provision, as it had done in connection with Article 4, which would permit payment of the compensation by a third State or party in those cases where the requesting State would not be able to meet its obligations. This proposal was based on the idea that the placing of a cultural object in its original setting was a question of universal importance and not only for the State calling for the return of the object. The third State or party would likewise undertake to meet the cost of insurance and of the proper conservation of the object (cf. Study LXX - Doc. 29, Misc. 54).

157. One representative suggested that it was difficult to conceive of the possessor being an individual and consequently proposed that the text be modified to read "When returning the cultural object, the State of the possessor may require...".

158. At the first session of the committee a number of representatives had suggested specifying the criteria which would determine whether the possessor had shown the necessary diligence, as had been done in Article 4(2) and some of them suggested a number of factors which might be taken into account for the purpose of ascertaining whether the possessor had been in "good faith": one representative recalled the existence of data banks concerning legislation on cultural property which contained for example a list of objects whose export was prohibited and suggested that their consultation be one of the important elements to which regard should be had (cf. Study LXX - Doc. 29, Misc. 42). Another representative proposed having recourse to the concept of a certificate of origin or of authorisation, as was the case with the proposal for an EEC Regulation concerning the export of cultural objects (Article 2, paragraph 2: "The export licence shall be valid in all Member States of the Community"), to which might be added a phrase according to which the possessor, to prove his good faith, would have to present the special authorisation which he must have obtained when importing the cultural object from the requesting State (Study LXX - Doc. 29, Misc. 25).

159. The committee then considered paragraph 2 which contemplated other options for a possessor required to return a cultural object to the requesting State when it had not been established that he either knew or ought to have known of the illegal character of the export. However this principle of providing alternatives to compensation was not the object of a consensus within the committee as some members called for their deletion while others believed that they would facilitate ratification of the future Convention.

160. Some representatives believed that such alternatives were undesirable, either because a number of laws provided that the illegal export of cultural objects which those States considered to belong to their cultural heritage as defined by national law would automatically constitute a transfer of ownership from the author of the breach of legislation to the State, or because any dispute relating to compensation which might be payable should be submitted for decision to a competent authority and the possessor of such an object should not be able to transfer it a third person, thereby preventing the requesting State from obtaining possession of an object illegally removed from its territory.

161. Some members of the study group however recalled the reasons which had led it to include such a provision in the preliminary draft with a view to facilitating the return of the cultural object. The group had indeed considered that it would be easier for those States which were

called upon to apply the legislation of another State to ratify the Convention and to convince their Parliaments to accept it if it were made clear that this did not imply a confiscation of private property which was protected in certain States by their Constitution. Another argument had been that the financial difficulties of the requesting State might not permit it to pay compensation in which case there would be no return.

162. While understanding the concern which had led to the inclusion of the provision, one representative nevertheless indicated that certain countries such as her own could not accept such a flexible solution and suggested introducing in Article 11 a clause permitting Contracting States to make provision neither for compensation nor for the alternative solutions, a proposal which would represent a compromise for those States whose Constitution protected ownership or which had a more philosophical approach (cf. Study LXX - Doc. 29, Misc. 18 rev.).

163. A majority of representatives agreed that the present drafting did not sufficiently reflect those two concerns, namely that of the requesting State which might have difficulty in paying compensation, and that of the State addressed whose Constitution protected private property, and that the confusion was brought about by the use in the English version of the words "ownership and possession", for if the possessor were permitted to retain possession of the object that amounted to saying that the cultural object would not be returned to the requesting State, which was contrary to the aim and philosophy of the future Convention.

164. Always in connection with the concepts of possession and ownership, one representative pointed out that the word "possessor" had been used in paragraph 1, and in paragraph 2 the words "the possessor may... decide to retain ownership", whereas in fact the possessor might in some cases not be the owner, and she therefore proposed amending the text by adding the words "the possessor may, where appropriate,...". It was also suggested that the new formulation proposed by the French delegation constituted a significant improvement over the original text as it made it clear that the possessor could either retain or transfer ownership, without any reference being made to possession (cf. Study LXX - Doc. 24, p. 9).

165. The choice between compensation and the alternative solutions was given under paragraph 2 to a possessor who neither knew nor ought to have known that the object had been illegally exported. Some representatives, who saw the intention of the provision as being to improve the position of the requesting State and not to favour the possessor, proposed that the option should be open to a requesting State which had done all that it could to secure the return of the object and because this would avoid the possibility of the possessor returning the object to the person who had illegally exported it ("When the cultural object is returned, the requesting State may, instead of paying compensation, permit

the possessor to retain ownership..."). The Chinese delegation feared that this paragraph might be contrary to the laws of certain requesting States and therefore suggested introducing the idea of a prior authorisation for the retention or transfer ("..., with the permission of the requesting State or the dispossessed owner, the possessor may, instead of requiring compensation, decide...)" (cf. Study LXX - Doc. 24, p. 8). Another delegation, which on the contrary saw the purpose of the provision as being to protect an owner whose conduct had been irreprehensible by avoiding that the return of the object cause him damage, believed that the choice among the various possibilities should be left to the possessor as was provided for in the present text.

166. One representative moreover proposed that the transfer of an object against payment or gratuitously to a person residing in the requesting State, for which provision was currently made, should be limited to museums or public institutions, as they were better equipped to provide the necessary guarantees regarding the protection, conservation or security of the object. This proposal would in addition permit the deletion of the words "and who provides the necessary guarantees" which had been severely criticised as being vague and imprecise. Some representatives in effect called for the deletion of those words or, if they were to be retained, for clarification as regards their interpretation which should be given in the text itself. One representative also proposed extending those necessary guarantees to a possessor who decided to retain ownership of the object, which was not provided for in the provision as it stood.

167. Paragraph 3 was not the subject of discussion by the committee, although the Turkish delegation had indicated in its written observations that expenses associated with the return of a cultural object should be the responsibility of the possessor if he knew or ought to have known that the object had been illegally exported, and not that of the requesting State in all cases as was presently the situation under paragraph 3 (cf. Study LXX - Doc. 24, p. 22) and a number of delegations tabled a joint proposal to add a new sub-paragraph (b)(iii) to Article 11 which would require the cost to be borne by a State other than the requesting State (cf. Study LXX - Doc. 29, Misc. 17).

168. Finally, the committee restated its agreement in principle with the need to take account of the situation contemplated by paragraph 4, recalling however that the wording of the draft EEC Directive was clearer. One representative emphasised the connection between this paragraph and the periods of limitation, expressing concern that the language of the two provisions might suggest that the period would stop running from the time of the gift or succession.

169. The committee was, on second reading, called upon to decide on a number of fundamental questions in respect of which different options were contained in the various paragraphs of Article 8 (cf. Study LXX - Doc. 29, Misc. 37 rev.). The first paragraph took over the form of wording

proposed by the French delegation which established the principle of there being no compensation for the possessor, while paragraph 2, between square brackets, was the former paragraph 1 which provided for compensation in the absence of knowledge by the possessor of the illegal character of the export. The basic issue was therefore that of the payment of compensation to the possessor to which a number of representatives were opposed. 16 delegations voted in favour of the principle of compensation and 15 against while seven abstained.

170. As to the idea contained in paragraph 3 concerning reimbursement of the expenses incurred by the possessor for the protection or restoring of the object, nine delegations voted in favour of the provision and 13 against while 14 abstained.

171. Two versions of the new paragraph 4 were submitted to the committee, the first being the former paragraph 2 together with some new ideas included between square brackets, while the second amounted to a new presentation of the original text. It was emphasised that paragraph 4 was based on the hypothesis that the concept of compensation would be maintained in paragraph 2, and a number of delegations wished to offer other possibilities to the possessor. The committee was of the view that the only question to be voted upon for the moment was that of the inclusion in the text of the various options open to the possessor: 17 delegations voted for the possibility of alternatives to the payment of compensation, while 11 voted against and 10 abstained.

172. A number of representatives came back to the question of the words "possession" and "ownership" in the English version, being of the belief that different language should be employed as those words could have as many different meanings as there were legal systems. Some representatives would have preferred to proceed to an indicative vote on those words but it was suggested that the question required further discussion from a comparative law standpoint and the fear was expressed that delegations would when voting see the problem differently according to their own national laws.

173. The question of the definition of certain basic concepts in the preliminary draft Convention, for example that of the possessor, was likewise taken up by certain representatives who suggested that a vote be taken on the need for such definitions. It was recalled however that the same question had arisen in connection with Article 3, but that the committee had considered that more detailed discussion would be necessary before it proceeded to a vote on the two possible approaches to the problem, namely that followed in the existing draft (no list of definitions) and that to be found in a number of international Conventions and national laws which started out from a list, as was the case with the draft EEC Directive.

174. The committee decided to defer to its next session any decision regarding the language placed in square brackets in the text as well as that concerning the new paragraph 5 relating to the incurring of expenses associated with the return, as no delegation had called for its deletion.

175. Paragraph 6 reflected the idea put forward by the Italian delegation of a sponsor who would pay the compensation in place of the requesting State. It was however generally agreed not to vote on that matter, as had already been the case with the parallel provision in Article 4, as there had been no substantive discussion of the proposal.

176. No opposition of principle having been raised during the consideration of paragraph 4, which appeared in document Misc. 37 rev. as paragraph 7 together with a proposal of the United States delegation between brackets, the committee did not vote on the provision.

177. In conclusion, the representative of Finland drew the attention of the committee to his proposal to insert a new Article 8 bis worded as follows: "The court or other competent authority of the State addressed, in ascertaining whether there has been an illicit removal of a cultural object in the meaning of Article 5, may request that the requesting State obtain from the court or other competent authority of the requesting State a decision or other determination that the removal of the object was illicit under Article 5." (cf. Study LXX - Doc. 29, Misc. 48).

CHAPTER IV - CLAIMS AND ACTIONS

Article 9

178. The Secretary-General of the Hague Conference recalled that paragraph 1 of Article 9 directly established direct grounds of jurisdiction with respect to the dispute, that is to say the claim for restitution or return. He underlined the great merit of the article in that it had chosen a completely new ground of jurisdiction from the point of view of comparative law, that is to say that of the State where the cultural object was located. There was in effect no direct ground of jurisdiction for the recovery of movable property in comparative law and in particular in the international Conventions which excluded that possibility. This was however a very special case, namely the recovery of a cultural object, and it was therefore natural that a claim be brought before a judge of the State where the object was located for reasons of speed and efficiency. It was however clear that a special Convention should not deprive the parties of the options available under the normal rules governing jurisdiction, and particularly those established by the international Conventions (for example the Brussels and Lugano Conventions).

179. He also drew the attention of the committee to the many complex problems involved and noted that once jurisdiction was conferred on a court

of a State other than that where the cultural object was located, for example a court of the State of the possessor's residence, it would be necessary for the judgment of the court of the State addressed which had ordered the return to be enforced in another Contracting State. The question then arose of whether the State where the object was located would be able to refuse to enforce that judgment on grounds that it could itself have invoked had it been directly seized of the claim for return.

180. With a view to overcoming these difficulties he had drawn up, together with a representative of the Netherlands delegation, a new text to be found in Study LXX - Doc. 29, Misc. 44. The aim of the text was to deal with the problem of direct jurisdiction in an extremely limited way by referring only to those grounds of jurisdiction which were of direct interest to the draft Convention. The idea was to retain the normal rules, or rules established by Conventions, concerning jurisdiction familiar to the Contracting States and, without prejudice to those rules, Article 9 would provide that the claimant could in all cases bring a claim under the Convention before the court or competent authority of the Contracting State where the cultural object was located, thereby, for the purposes of the Convention, adding a new and hitherto unknown ground of jurisdiction to those found in traditional Conventions.

181. The second paragraph of the proposal laid down a subsidiary rule of international mutual assistance and solidarity among States. Thus, if for example the claimant were to bring an action before a court of the defendant's domicile, the court of the place where the cultural object was located ought not, for the reason that the action had been brought in another Contracting State, to be dispensed from the taking of provisional, including protective, measures available under its own law with respect to the object.

182. One delegation had raised in its written observations the question of the absence in the text of any provision concerning the measures to be taken to safeguard a cultural object while legal action was in progress and it proposed that this omission be corrected, for example by providing that a State in which a cultural object was located could prohibit its further export once an action had been commenced (cf. Study LXX - Doc. 24, p. 5).

183. An affirmative answer was given to the question of whether such a procedure would apply both to Chapter II and to Chapter III, since Article 9 was contained in Chapter IV which applied to both of those Chapters. It was however pointed out that claims brought under Chapter III did not fall within the scope of application of the Brussels and Lugano Conventions since one of the parties to the dispute would be a public authority acting as such with a view in particular to the reconstitution of its cultural heritage. In the interest of the States Parties to the Brussels, Lugano and San Sebastian Conventions, one representative drew the attention of the committee to the fact that one of the consequences of the

proposal set out in document Misc. 44 would be that judgments rendered under Chapter II would be recognised and enforced by the States Parties under Article 57.3 of the Brussels Convention as modified by the successive Conventions ("This Convention shall not affect the application of provisions which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments and which are or will be contained in acts of the institution of the European Communities or in national laws harmonized in implementation of such acts").

184. The Greek delegation indicated that it had a somewhat different view of this matter and proposed adding the jurisdiction of the *forum delicti*, which was well known both in international Conventions and in national law (cf. Study LXX - Doc. 29, Misc. 41, Article 9). It was necessary to confer jurisdiction on the State where the illegal act had been committed so as to assist poor countries obliged to bring an action before the authorities of a distant State, which would involve considerable expense and a degree of uncertainty as to the outcome of the proceedings, above all in respect of illegally exported objects. The Greek delegation recalled that there was always an illegal act (theft, illegal excavation, illegal export) underlying the obligation of the possessor to return the object, and that it would therefore be normal to make provision for, and to accept, the jurisdiction of the place where that act had been committed. This proposed Article 9 was followed by four other articles concerning the enforcement of the judgment and possible grounds of refusal of such enforcement (cf. Study LXX - Doc. 29, Misc. 41, Articles 9 bis, ter, quater and quinquies).

185. The Secretary-General of the Hague Conference however considered that while one could as a matter of principle accept the jurisdiction of the *forum delicti* as being specific to the Convention, it would be dangerous to recognise it for while apparently facilitating the task of the State or the claimant, it might result in complications and in a possible refusal to accept the future Convention since as a general rule the *forum delicti* would in practice be the same as the forum of the claimant (*forum actoris*), particularly in the case of illegal export where the law of a State had been breached, the illegal act had been committed in another State and jurisdiction was therefore given to the courts of that State. It was most unlikely that this ground of jurisdiction would commend itself to the other Contracting States.

186. It was moreover suggested that most of those States which had difficulties in ensuring the respect of their cultural heritage and which had limited financial means would naturally have recourse to the option contained in Article 11(a)(iii) so as to deprive the possessor of compensation, and would order the return of the object without compensation whenever it was located on the territory of a third State which would then be called upon to enforce the judgment. If however, as was most likely, that third State's notions of the respect of private ownership and of good faith possession were to be different from those of the requesting State,

it would refuse to grant enforcement. It was also pointed out that these problems of international enforcement would not arise under the ordinary rule of competence of the court of the defendant's domicile for even if the object were located in another State it would always be possible for the court of the domicile of the defendant to issue an injunction requiring him to return the cultural object, failure to do which could result in the imposition of a fine or possibly a criminal sanction. This would not be the case in the State from which the object had been removed if the claimant had no assets in that State.

187. The United States delegation drew the attention of the committee to the fact that the purpose of Article 9 was not only to establish grounds of jurisdiction but also to define more clearly which international claims were admissible and it was for this reason that it had made a proposal permitting the determination of the parties who would be entitled to bring a claim, in which circumstances and in which States (cf. Study LXX - Doc. 29, Misc. 53). The concern was the same as that which had been expressed in connection with Article 1 to limit the scope of application of the proposed Convention to international situations only. This proposal was supported by one representative who believed that it was important to identify the claims which could be brought under Chapter II and who could bring them, as he wondered whether the owner of an object stolen in one State and transferred to another would have to be habitually resident in one of those two States or in a third Contracting State so as to be able to bring the action. It was pointed out that this difficulty did not arise in connection with Chapter III which was concerned with States and not with individuals.

188. Most representatives however believed this to be above all a question of drafting technique and of structure. The study group had chosen a broad form of wording which was a technique often used in international Conventions, but some might prefer other techniques, in particular those employed in Common Law systems. It was however emphasised that if this latter approach were to be followed it would be necessary to rewrite the Convention completely as it would not be possible to combine general formulations with very precise articles.

189. The committee decided that a small restricted group should be set up with a view to submitting a joint proposal, either in the form of a longer article, or of another article which would take account of the concerns expressed by the United States delegation and others. It was moreover suggested that the concern of the United States was due also to the fact that Article 1 did not, for the time being, clarify what was an international situation and insofar as Chapter II of the Convention ought to apply only in respect of Contracting States, there was now a proposal on the table to settle those questions. The restricted group should therefore consider not only Article 9 but also the proposals which had been made in relation to Article 1.

190. The committee then considered paragraph 2 of the article which provided that the parties might agree to submit their dispute to another jurisdiction or to arbitration. One representative stated that if the intention of the proposal was that Contracting States should be obliged by the paragraph to consider all claims submitted to their courts, this would not be acceptable. So as to meet this concern, it was suggested that the paragraph and the reference contained therein to the forum agreed upon by the parties and to arbitration should be deleted as the purpose of the Convention was not to lay down substantive rules of private international law, and some might be of the opinion that questions concerning cultural objects ought not to be regulated by an arbitral agreement or by an agreement as to jurisdiction.

191. While some representatives were willing to contemplate the deletion of the reference to the forum chosen by the parties as they were opposed to the idea that the Convention should oblige States to accept such a choice, the same was not the case with arbitration as specialised arbitration in the field of cultural property ought not only to be permitted but even encouraged. Other representatives proposed the retention of paragraph 2 with both references, specifying however that this would in no way alter the existing rules of the State addressed, that is to say that it would not be obliged to entertain all claims submitted to it.

CHAPTER V - FINAL PROVISIONS

Article 10

192. A majority of representatives were in favour of the principle set out in this article, namely that the future Convention should only apply when a cultural object had been stolen or removed from the territory of a Contracting State contrary to its legislation after the entry into force of the Convention in respect of the Contracting State before the courts or other competent authority of which a claim was brought for the restitution or return of such an object. Some representatives however suggested that such a provision was unnecessary since according to the normal rules of interpretation of international Conventions, and this was expressly affirmed in Article 28 of the Vienna Convention on the Law of Treaties, treaties were not normally of retroactive application.

193. Others believed the provision to be necessary for the purposes of clarification in view of the fact that the future Convention should only apply to international situations. Without the article the question might arise of whether the Convention would not in part at least be applicable retroactively in cases where the theft had taken place before its entry into force but the international character of the situation only came to light after the entry into force of the Convention in respect of both States.

194. The United States delegation supported this proposition and recalled the proposal it had made at the first session of the committee in connection with non-retroactivity, the effect of which was that the Convention would only apply to claims in respect of a cultural object which was stolen or illegally exported after both Contracting States concerned had become Parties to the Convention (cf. Study LXX - Doc. 22, Misc. 8).

195. While understanding the reasons for not giving the future Convention a retroactive character, and that the objective of the Convention was not to declare an amnesty for illegal acts and to cover them with a veil of legitimacy, one representative nevertheless believed that it had to be understood that certain States would find a retroactive application to be acceptable. He therefore proposed that it be stated in Article 10, or in the preamble, that such acts committed before 1970 were not legitimate but that they fell outside the scope of application of the Convention. This would mean that requesting States would be free to bring their private law actions through diplomatic channels, under inter-institutional agreements, or in accordance with the procedures of the Unesco Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation.

196. The Nigerian delegation proposed adding a second paragraph to Article 10 which would state that nothing would prejudice the right of a State to address a claim to another State outside the framework of the Convention in respect of an object stolen or illegally exported before the coming into force of the Convention (cf. Study LXX - Doc. 29, Misc. 46). Some representatives however believed that this concern was already covered by Article 11(c).

197. The Greek delegation proposed adding a second paragraph to the article which would convey the idea that any future regulation of cultural objects stolen or illegally exported before the entry into force of the Convention would not be precluded. It suggested that if it were to be deemed appropriate to mention the question of retroactivity so as to provide assurances to some States, it would be equally appropriate, with a view to reassuring others, to include such a provision whose importance would be psychological rather than legal. It therefore proposed adding the following wording: "This does not in any way preclude any future extension of the Convention so as to apply to objects stolen or illegally removed from the territory of a Contracting State by excavation or contrary to its legislation, before the entry of the Convention into force" (cf. Study LXX - Doc. 29, Misc. 45).

198. During the first meeting of the committee of experts some representatives proposed drawing a distinction between illegally exported cultural objects in respect of which the principle of non-retroactivity should apply, and stolen cultural objects to which it would not. In its written observations, the Turkish delegation indicated that while it was in

favour of the principle of retroactivity being enshrined in the future Convention, the distinction would be acceptable on condition that the definition of stolen cultural objects embraced those originating from clandestine excavations (cf. Study LXX - Doc. 24, p. 23).

199. Finally, with regard to the application of the principle of non-retroactivity in the case of stolen cultural objects, one representative drew the attention of the committee to the question of whether the Convention would apply in cases where a cultural object was stolen within the territory of a State before the entry into force of the Convention but removed from that State only after its entry into force. So as to take account of that possibility, he proposed adding between square brackets after the word "stolen", the words "on the territory". There being no time to discuss this proposal, it was decided to defer consideration of it until the third session of the committee.

Article 11

200. One representative indicated that from a practical point of view provision should be made for a system of notification at the time of ratification, or subsequent thereto, so as to indicate the options chosen by a State in application of this article. This was current practice in international conventions and would permit the future Convention to operate more smoothly. The proposal was favourably received by the members of the committee of experts who deferred more detailed discussion of it until the examination of the final clauses.

201. At the first session of the committee of experts, the Hungarian delegation had submitted a proposal to amend sub-paragraphs (a) and (b) of Article 11 by substituting a general formula for the present exhaustive list of situations in which a Contracting State might apply its own national law when this was more favourable to a claimant than the provisions of the Convention (cf. Study LXX - Doc. 22, Misc. 5 rev.). Lack of time had not permitted this proposal to be discussed during the meeting and the Hungarian delegation now suggested that if the proposal made in document Misc. 5 rev. were not to be adopted, the application of the national law of the State addressed, to the extent that it provided for more favourable treatment of claimants than did the proposed Convention itself, should be made obligatory at least in respect of the cases presently provided for in Article 11(a)(ii) and (b)(ii). To this end it proposed dividing Article 11 into two paragraphs: Paragraph 1 would contain the present text of the article, with the exception of the two sub-paragraphs mentioned above which would be contained in a new paragraph 2 of Article 11. It believed that the suggested amendment corresponded to the purpose of the draft Convention which was to promote the return of cultural objects illegally removed from the requesting State rather than to restrict the channels already open to that end by virtue of the national law of the State addressed (cf. Study LXX - Doc. 29, Misc. 30).

202. The United States delegation recalled that its country's Constitution required the payment of just compensation if a person having title to an object was required to give it up and it therefore proposed amending Article 11 by adding at the end of sub-paragraph (a) a fourth clause as follows: "(iv) to apply its national law when this would require just compensation in the case where the possessor has title to the cultural object" (cf. Study LXX - Doc. 29, Misc. 39).

203. The representative of Finland enquired, in connection with Article 11 (a)(iii), whether the words "national law" referred exclusively to the domestic law of the State in question, or whether they also covered the conflict rules of that State. He suggested that if this latter reading were not correct, then the provision should be replaced by a rule which would make no direct reference to the national internal law but rather to the law applicable to the acquisition, and he proposed the addition of a new paragraph to Article 4 (cf. Study LXX - Doc. 29, Misc. 40 and paragraph 74 of this report). In effect, the idea underlying Article 11 was not to prevent the application of a regime which was more favourable to the return of cultural objects, unlike another concept of uniform law where all Parties would apply the same regime, which could signify a step backwards in certain States in regard to the protection of cultural property. The purpose of the proposal was to make it clear that the whole of the law, including the private international law, of the State addressed would apply in cases of this type, thereby permitting the application of the law of the State of origin requesting the return of the object which might be more favourable to that State than would the application of the internal law of the State addressed.

204. Some representatives however were not in favour of recourse to the applicable law and preferred to retain the reference to national law. One of them pointed out in particular that unless there were to be a restriction to national law, it would be difficult for the Contracting States to know what were their rights and obligations and he wished to avoid recourse to the principle of *renvoi* for the purpose of establishing them.

205. The delegations of Australia, Canada and the Netherlands submitted a proposal to include a new clause (iii) in sub-paragraph (b), to the effect that the costs referred to in Article 8(3) should not in all cases be borne by the requesting State (cf. Study LXX - Doc. 29, Misc. 17).

206. The Australian delegation had already referred, during the discussion on Article 8, to the desirability of providing alternative solutions to that of payment of compensation to the "good faith" possessor, since its country favoured neither such a flexible solution nor the payment of compensation for which its national law made no provision. It therefore proposed including in sub-paragraph (b) two new clauses (iii) and (iv) which would permit a State to apply its national law when this would disallow the possessor's right to compensation or deny the possessor the

options provided for in Article 8(2) (cf. Study LXX - Doc. 29, Misc. 18 rev.).

207. Finally, if some had believed that sub-paragraph (c) would satisfy those States which favoured a retroactive application of the future Convention, one representative drew the attention of the committee to the serious difficulties which it posed in that it made provision for a Contracting State to apply the Convention notwithstanding the fact that the illegal act had been committed before the entry into force of the Convention in respect of that State. He feared that this sub-paragraph would undermine the whole approach of the Convention and insisted on the fact that States would only be bound when both of them were Contracting Parties. He therefore expressed his agreement in principle with the type of general proposal put forward by the Nigerian delegation.

Article 12 (new)

208. The Israeli delegation drew the committee's attention to a proposal to add the following new Article 12: "Nothing in this Convention shall prevent States Parties thereto from continuing to implement agreements already concluded regarding the restitution of cultural objects removed, whatever the reason, from the territory of each State before the entry into force of this Convention for the States concerned." (cf. Study LXX - Doc. 29, Misc. 51). For want of time, the committee deferred the discussion to its next session.

Article 13 (new)

209. The Israeli delegation also submitted a proposal, discussion on which was deferred, for a new Article 13 concerning an undertaking by States Parties not to impose customs duties, worded as follows: "States Parties shall impose no customs duties or other charges upon (a) claims pursuant to this Convention; (b) cultural objects returned pursuant to this Convention." (cf. Study LXX - Doc. 29, Misc. 51).

Item 3 - Other business

210. The Secretary-General briefly recalled the history of the draft Convention currently before the committee and in particular Unesco's request to Unidroit to study a number of private law and private international law aspects of the international protection of cultural objects. Clearly however many of the questions considered by the committee had strong policy overtones and it was therefore not surprising that agreement had still to be reached on a number of important issues.

211. This being said, the resources of Unidroit were finite and given the existence of other priority items on the Institute's Work

Programme it was apparent that the work of the committee could not carry on indefinitely. In those circumstances the Secretariat proposed that the committee meet for a third, and hopefully final, session towards the end of October or early November 1992 of approximately the same length as the present session. As requested by the committee, the Secretariat would prepare a revised text of the draft Convention for that session which would be based essentially on that drawn up by the drafting committee in respect of Articles 1 to 8 and on the written proposals submitted in relation to Articles 9 to 11 and for the inclusion of new articles. Naturally, the text to be prepared by the Secretariat would also take account of the indicative votes to which the committee had proceeded during the session.

212. As regards the procedure of the committee at its third session, he believed that it might be in the interest of speeding up the work to contemplate the setting up of working groups to deal with particular articles or groups of articles with a view to seeking a consensus. Experience showed that such a procedure was often more productive than discussion in plenary but while the main currents of opinion should naturally be adequately represented in such groups they should be small if they were to be effective.

213. Similar considerations applied to the drafting committee whose task, he insisted, was not to take policy decisions but simply to reflect in as clear and simple language as possible the instructions given to it by the committee as a whole. The size of the drafting committee at the present session had seemed to suggest that a number of delegations had seen its role in a somewhat different light which had in the circumstances perhaps been understandable in view of the absence of clear policy directions from the committee itself. He therefore suggested that the drafting committee be called upon to meet at the committee's third session only when such directions had been given which hopefully would permit a much smaller drafting committee to be constituted on that occasion.

214. The invitations to attend the third session of the committee would be sent out in June 1992 and would be accompanied by the revised text together with a detailed report on the work of the committee's second session. Naturally, the Secretariat would endeavour to transmit to Governments in advance of the next session all written proposals received in sufficient time to permit their translation and circulation.

215. The Chairman stated that he had been unduly optimistic in thinking that it might have been possible for the committee to complete its work within two sessions and it was now evident that the committee would have to meet once again to complete its work. It was however imperative that the committee make progress on a number of fundamental points in regard to which there were still substantial differences of opinion. Such progress could only be achieved if a spirit of realism were to prevail, in other words if there were to be a recognition of the fact that if a serious effort were to be made to put an end to the scandal of the illegal trade in

cultural objects one important way of bringing this about would be a change in the private law rules and private international law rules of those States which could, for want of a more convenient term, be described as the "importing States".

216. This was in essence the task which Unesco had requested Unidroit to undertake and in this connection he insisted that, contrary to what had been suggested by some representatives, there was no incompatibility between the 1970 Unesco Convention and the Unidroit draft whose purpose was precisely to give more teeth to the 1970 Convention.

217. In these circumstances he recalled that the text prepared by the Unidroit study group had sought to strike a fair balance between the competing interests and that even if it did not provide full satisfaction to those who were primarily the victims of theft and illegal export it constituted a major step forward in relation to the existing situation and he appealed to delegations to bear this fact in mind when submitting proposals at the third session of the committee.

218. The Chairman thanked all the participants for their contribution to the discussions during the session which he declared closed at 11.50 a.m. on 29 January 1992.

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APPENDIX II

DRAFT AGENDA

1. Adoption of the draft agenda (G.E./C.P. - Ag.2)
2. Consideration of the preliminary draft Unidroit Convention on stolen or illegally exported cultural objects
3. Other business

**PRELIMINARY DRAFT UNIDROIT CONVENTION
ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS**

(approved by the Unidroit study group on the international protection
of cultural property at its third session on 26 January 1990)

CHAPTER I - SCOPE OF APPLICATION AND DEFINITION

Article 1

This Convention applies to claims for the restitution of stolen cultural objects and for the return of cultural objects removed from the territory of a Contracting State contrary to its export legislation.

Article 2

For the purpose of this Convention, "cultural object" means any material object of artistic, historical, spiritual, ritual or other cultural significance.

CHAPTER II - RESTITUTION OF STOLEN CULTURAL OBJECTS

Article 3

(1) The possessor of a cultural object which has been stolen shall return it.

(2) Any claim for the restitution of a stolen cultural object shall be brought within a period of three years from the time when the claimant knew or ought reasonably to have known the location, or the identity of the possessor, of the object, and in any case within a period of thirty years from the time of the theft.

Article 4

(1) The possessor of a stolen cultural object who is required to return it shall be entitled to payment at the time of restitution of fair and reasonable compensation by the claimant provided that the possessor prove that it exercised the necessary diligence when acquiring the object.

(2) In determining whether the possessor exercised such diligence, regard shall be had to the relevant circumstances of the acquisition, including the character of the parties and the price paid, and whether the possessor consulted any accessible register of stolen cultural objects which it could reasonably have consulted.

(3) The conduct of a predecessor from whom the possessor has acquired the cultural object by inheritance or otherwise gratuitously shall be imputed to the possessor.

CHAPTER III - RETURN OF ILLEGALLY EXPORTED CULTURAL OBJECTS

Article 5

(1) When a cultural object has been removed from the territory of a Contracting State (the requesting State) contrary to its export legislation, that State may request the court or other competent authority of a State acting under Article 9 (the State addressed) to order the return of the object to the requesting State.

(2) To be admissible, any request made under the preceding paragraph shall contain, or be accompanied by, the particulars necessary to enable the competent authority of the State addressed to evaluate whether the conditions laid down in paragraph (3) are fulfilled and shall contain all material information regarding the conservation, security and accessibility of the cultural object after it has been returned to the requesting State.

(3) The court or other competent authority of the State addressed shall order the return of the cultural object to the requesting State if that State proves that the removal of the object from its territory significantly impairs one or more of the following interests:

- (a) the physical preservation of the object or of its context,
- (b) the integrity of a complex object,
- (c) the preservation of information of, for example, a scientific or historical character,
- (d) the use of the object by a living culture,
- (e) the outstanding cultural importance of the object for the requesting State.

Article 6

When a State has established its claim for the return of a cultural object under Article 5 (3) the court or competent authority may only refuse to order the return of that object when it finds that it has as close a, or a closer, connection with the culture of the State addressed or of a State other than the requesting State.

Article 7

The provisions of Article 5 shall not apply when:

- (a) the cultural object was exported during the lifetime of the person who created it or within a period of fifty years following the death of that person; or
- (b) no claim for the return of the object has been brought before a court or other competent authority acting under Article 9 within a period of five years from the time when the requesting State knew or ought reasonably to have known the location, or the identity of the possessor, of the object, and in any case within a period of twenty years from the date of the export of the object, or
- (c) the export of the object in question is no longer illegal at the time at which the return is requested.

Article 8

(1) When returning the cultural object the possessor may require that, at the same time, the requesting State pay it fair and reasonable compensation unless the possessor knew or ought to have known at the time of acquisition that the object would be, or had been, exported contrary to the export legislation of the requesting State.

(2) When returning the cultural object the possessor may, instead of requiring compensation, decide to retain ownership and possession or to transfer the object against payment or gratuitously to a person of its choice residing in the requesting State and who provides the necessary guarantees. In such cases the object shall neither be confiscated nor subjected to other measures to the same effect.

(3) The cost of returning the cultural object in accordance with this article shall be borne by the requesting State.

(4) The conduct of a predecessor from whom the possessor has acquired the cultural object by inheritance or otherwise gratuitously shall be imputed to the possessor.

CHAPTER IV - CLAIMS AND ACTIONS

Article 9

(1) The claimant may bring an action under this Convention before the courts or other competent authorities of the State where the possessor of the cultural object has its habitual residence or those of the State where that object is located at the time a claim is made.

(2) However the parties may agree to submit the dispute to another jurisdiction or to arbitration.

CHAPTER V - FINAL PROVISIONS

Article 10

This Convention shall apply only when a cultural object has been stolen, or removed from the territory of a Contracting State contrary to its export legislation, after the entry into force of the Convention in respect of the Contracting State before the courts or other competent authorities of which a claim is brought for the restitution or return of such an object.

Article 11

Each Contracting State shall remain free in respect of claims brought before its courts or competent authorities:

(a) for the restitution of a stolen cultural object:

- (i) to extend the provisions of Chapter II to acts other than theft whereby the claimant has wrongfully been deprived of possession of the object;
- (ii) to apply its national law when this would permit an extension of the period within which a claim for restitution of the object may be brought under Article 3 (2);

- (iii) to apply its national law when this would disallow the possessor's right to compensation even when the possessor has exercised the necessary diligence contemplated by Article 4 (1).

(b) for the return of a cultural object removed from the territory of another Contracting State contrary to the export legislation of that State:

- (i) to have regard to interests other than those material under Article 5 (3);
- (ii) to apply its national law when this would permit the application of Article 5 in cases otherwise excluded by Article 7.

(c) to apply the Convention notwithstanding the fact that the theft or illegal export of the cultural object occurred before the entry into force of the Convention for that State.